TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 542.

WILLIAM M. McCARTY, APPELLANT,

vs.

CHARLES A. MANN AND EBEN MAYALL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED OCTOBER 14, 1873.

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1 UNITED STATES OF AMERICA,
District of Minnesota, ss:

WILLIAM M. McCARTY
vs.
CHARLES A. MANN AND EBEN MAYALL.

Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, sitting in equity.

DISTRICT OF MINNESOTA, *ss:*

Be it remembered that on this second day of October, in the year of our Lord one thousand eight hundred and seventy-two, came the above-named plaintiff, William M. McCarty, by Messrs. Gilman, Clough & Wilde, his solicitors, and filed in the clerk's office of said court his bill of complaint in writing, in the words and figures following, viz:

2 Circuit court of the United States, district of Minnesota.

To the judges of the circuit court of the United States for the district of Minnesota:

William M. McCarty, a resident of Huntsville, and a citizen of the State of Alabama, brings this bill against Charles A. Mann and Eben Mayall, residents of St. Paul and citizens of the State of Minnesota, and thereupon your orator complains and says:

That heretofore, to wit, on the 3d day of March, A. D. 1849, the United States of America were the owners as part and parcel of their public lands of all the following-described lands, situated in the county of Ramsey, and State of Minnesota, and district aforesaid, that is to say, the southwest quarter (¼) of the northeast quarter (¼) and west half (½) of the southeast quarter (¼) of the northeast quarter, (¼,) and the northwest quarter (¼) of the southeast quarter (¼) of section thirty-six (36) in town. twenty-nine (29) north, of range twenty-three west, according to the United States Government survey. That the United States continued to be the owners of all said lands until they granted and conveyed the same, as hereinafter alleged, under the provisions of the act of Congress of July 27th, 1857, hereinafter referred to; that

3 heretofore, to wit, on the 12th day of January, 1850, one Peter Poncin, then being the owner of a certain military land-warrant, entitling the owner to one hundred and sixty acres of the public lands of the United States not otherwise appropriated or set apart, applied to the proper officers of the land-office of the United States for the Stillwater land district in the then Territory of Minnesota, to locate said land-warrant upon the south half (½) of the northeast quarter (¼) and the north half (½) of the southeast quarter (¼) of the section aforesaid, containing one hundred and sixty acres of lands, and embracing the lands first above described with such land-warrant, which lands were not then subject to such entry and location, the same having by law previously withdrawn from entry or location under land-warrant or otherwise, and appropriated and set apart for the aid of the schools of the then Territory and future State of Minnesota; that such entry and location were thereupon without authority of law allowed by said land-officers, and a certificate by them, under their hands, of such location and entry, bearing date on that day, in the usual form, issued to the said Poncin; that afterwards, and on the 28th day of March, 1850, the said Poncin,

in consideration of the sum of one hundred and fifty dollars to him by Antoine Pepin in hand paid, made, executed, acknowledged,
4 and delivered in due form of law to said Antoine Pepin his deed of conveyance, bearing date on that day, wherein and whereby he purported to convey unto the said Pepin, and unto his heirs and assigns forever, all the lands first hereinbefore described; and in and by said deed, for himself, his heirs, and assigns, covenanted to and with the said Pepin, his heirs and assigns, that he, the said Poncin, his heirs and assigns, would forever warrant and defend the said Pepin, his heirs and assigns, in the peaceable and quiet possession and enjoyment of all the lands first hereinbefore described against any and all persons claiming, or who might claim, said lands or any part thereof; which deed of conveyance, after the execution thereof, and on the 2d day of April, 1850, was recorded in the office of the register of deeds in and for said county of Ramsey, in book A of deeds, on page 268. That afterwards, and on the 29th day of March, 1850, in consideration of the sum of one hundred dollars, to him by Alpheus R. French in hand paid, the said Pepin made, executed, acknowledged, and delivered in due form of law, to said Alpheus R. French, his deed of conveyance, wherein and whereby he purported to convey unto the said French, and unto his heirs and assigns forever, all the lands first hereinbefore
5 described; and in and by said deed, for himself, his heirs and assigns, covenanted to and with the said French, his heirs and assigns, that he, the said Pepin, his heirs and assigns, would forever warrant and defend the said French, his heirs and assigns, in the peaceable and quiet possession and enjoyment of all the lands first hereinbefore described against any and all persons claiming, or who might claim, the same or any part thereof; which deed of conveyance, after the execution and delivery thereof, and on the 16th day of January, 1851, was recorded in the office of said register of deeds, in book B of deeds, on page 144.

And your orator further alleges that, after the location and entry aforesaid by the said Poncin, the Commissioner of the General Land-Office of the United States duly cancelled such location and entry, and thereupon said land-warrant was withdrawn from the possession of the officers of the United States by said Poncin, and the same was restored to him; that after such cancellation and the said withdrawal by said Poncin of said land-warrant and the restoration thereof to him, and on the 27th day of July, 1854, the Congress of the United States passed an act entitled "An act authorizing a patent to be issued to Peter Poncin for certain lands therein described," approved on that day,
6 wherein and whereby it was provided that the said entry and location, by said Poncin, cancelled as aforesaid, should be and thereby was allowed and re-instated as of thedate of said location and entry, so that the title to the lands embraced in said location and entry might enure to the benefit of the grantees of said Poncin, as far as he might have conveyed the same; provided, that the money paid for said lands should not have been withdrawn, or, if withdrawn, should be again paid at said Land-Office; and that thereupon a patent should issue in the name of said Peter Poncin for said land. That afterwards, and on the 24th day of March, 1855, the said Poncin having, before that time and subsequently to the passage of said act, paid into the said Land-Office the price of said lands in money, the United States, in accordance with said act of Congress, and in pursuance of the laws, rules, and regulations for such case made and provided, executed and delivered unto the said Poncin their patent in due form of law, bearing

date on that day, whereby they conveyed unto the said Poncin, and unto his heirs and assigns forever, all the lands embraced in said location and entry, which patent was, on the 3d day of July, 1855, recorded in the office of said register of deeds, in book N of deeds, on page 794.

That afterwards, and on the 24th day of January, 1856, the
7 said Alpheus R. French, together with his wife, made, executed, acknowledged, and delivered in due form of law their deed of conveyance to one Pierre P. Furber, wherein and whereby they conveyed unto the said Furber, and unto his heirs and assigns forever, all that part of the lands first hereinbefore described, designated as the southwest quarter (¼) of the northeast quarter, (¼,) and the west half (½) of the southeast quarter (¼) of the northeast quarter (¼) of said section; which deed afterwards and on the same day was recorded in the office of said register of deeds, in book M of deeds, on page 942. That on the same day the said French and wife made, executed, acknowledged, and delivered, in due form of law, to the said Furber, their certain other deed of conveyance, wherein and whereby they conveyed unto the said Furber, and unto his heirs and assigns forever, the remaining portions of the lands first hereinbefore described, designated as the northwest quarter (¼) of the southeast quarter (¼) of said section; which deed afterwards and on the same day was recorded in the office of said register of deeds, in book N of deeds, on page 611. That afterwards, and on the 28th day of June, 1856, the said Furber, together with his wife, made, executed, acknowledged, and delivered, in due form of law, to one
8 John P. Dunn their deed of conveyance, wherein and whereby they conveyed unto the said Dunn, and unto his heirs and assigns forever, all the lands first hereinbefore described; which deed afterwards and on the 1st day of July, 1856, was recorded in the office of said register of deeds, in book N of deeds, on page 664; that afterwards and on the 31st day of July, 1856, the said John P. Dunn, together with his wife, made, executed, acknowledged, and delivered in due form of law to me, Abraham H. Hammond, their deed of conveyance, whereby they conveyed unto the said Hammond, and unto his heirs and assigns forever, that part of the lands first hereinbefore described, designated as the northwest quarter (¼) of the southeast quarter, (¼) of the section aforesaid; which deed afterwards, and on the 7th day of August, 1856, was recorded in the office of said register of deeds, in book N of deeds, on pages 835 & 836; that on the 31st day of July, 1856, the said John P. Dunn and wife made, executed, acknowledged, and delivered in due form of law to the said Hammond their certain other deed of conveyance, whereby they conveyed unto the said Hammond, and unto his heirs and assigns forever, the residue of said lands hereinbefore first described, designated as the southwest quarter (¼) of the north-
9 east quarter, (¼,) and the west half of the southeast quarter (¼) of the northeast quarter of the section aforesaid; that afterwards and on the 20th day of September, 1862, the said Hammond, together with his wife, made, executed, acknowledged, and delivered in due form of law to your orator, their deed of conveyance, whereby they conveyed unto your orator, and unto his heirs and assigns forever, all the lands first hereinbefore described, and that your orator is the owner and entitled to the immediate possession of all said lands first hereinbefore described except five (5) acres thereof, heretofore conveyed by him, not embracing any of the lots or parcels hereinafter described.

And your orator further alleges that heretofore, to wit, on the 2nd day of July, A. D. 1855, D. A. Robertson and Isaac Van Etten, professing and pretending to be the owners of a certain parcel of the prem-

ises first above described, comprising about 80 acres thereof, made out and acknowledged and procured to be recorded in the office of the register of deeds aforesaid, a plat of such parcel, upon which plat such parcel is pretended and appears to be divided into streets, alleys, blocks, and lots, under the title of "Robertson and Van Etten's addition
10 to St. Paul;" which plat is recorded in book C of plats, on page 2; to which plat and the record thereof your orator refers for greater certainty.

And your orator further alleges that the said defendants claim some estate or interest adverse to your orater in all those parts and parcels of the lands first hereinbefore described as are designated in said plat as lots one, two, three, four and five, (1, 2, 3, 4, & 5) in block three (3;) lots one, two, three, four, five, six, seven, nine, ten, eleven, and twelve, (1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12,) in block four, (4;) lots one, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, (1, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12.) in block six, (6;) lots ten and twelve, (10 & 12,) in blocks seven, (7;) lots one, two, three, four, seven, eleven, and twelve, (1, 2, 3, 4, 7, 11 & 12,) in block eleven (11) lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12,) in block twelve, (12;) lots one, two, three, four, seven, eight, nine, ten, eleven, and twelve, (1, 2, 3, 4, 7, 8, 9, 10, 11, & 12,) in block twenty-one (21;) lots nine, ten, eleven, and twelve, (9, 10, 11, & 12,) in block twenty-two, (22;) and lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, and twelve, (1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12,) in block twenty-nine, (29;) that said lots and parcels are worth more than two thousand dollars, and the same and the whole
11 thereof are vacant and unoccupied lands, and that the defendants have not, and neither of them have, any rightful title, claim, or interest in or to any part of said parcels of lands.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, and direct answer make to all the matters hereinbefore alleged; and that the defendants may be adjudged and decreed to have no right, title, interest, or claim in any of the said parcels of said lands first hereinbefore described; and that your orator may be decreed to be the lawful owner of all the same, free and clear of any title or claim thereto on the part of the defendants, or either of them; and that your orator may be decreed to have such other and further relief as to your honors may seem equitable and just from the nature of his case;

May it please your honors to grant unto your orator the writ of subpœna of the United States directed unto the said Charles A. Mann and Eben Mayall, and unto each of them, thereby commanding them
12 to appear at a certain time and under a certain penalty therein to be limited personally before this honorable court, and then and there to answer all singular the premises, and to stand to and perform, and abide such order and decree therein as to your honors shall seem meet; and your orator shall ever pray.

J. M. GILMAN AND W. P. CLOUGH,
Pl'ff's Counsel.

13 And thereupon, upon motion of said plaintiff's said *said* solicitors, a writ of subpœna was duly issued out of the said court, duly tested, under the seal thereof, and in the words and figures following, viz:

14 UNITED STATES OF AMERICA,
District of Minnesota:

The President of the United States of America to Charles A. Mann and Eben Mayall, greeting:

We command you, and every of you, that you appear before our judges of our circuit court of the United States of America for the district of Minnesota, at St. Paul, in said district, on the first Monday in the month of November next, to answer the bill of complaint of William M. McCarty, this day filed in the clerk's office of said court, in said city of St. Paul, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Minnesota to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at St. Paul aforesaid, this second day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of our Independence the ninety-seventh year.

[SEAL OF COURT.] H. E. MANN, *Clerk.*
J. M. GILMAN & W. P. CLOUGH, *Pl'ff's Solicitors.*

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at St. Paul aforesaid, on or before the day to which the within writ is returnable, the complaint will be taken against them as confessed, and a decree entered recordingly.

H. E. MANN, *Clerk.*

15 Which writ of subpœna was afterwards duly returned to said clerk's office, endorsed by the marshal of the United States for the district of Minnesota as follows, viz:

DIST. OF MINNESOTA, *ss:*

I hereby certify that I served the within subpœna on the within-named Chas. A. Mann, personally, at St. Paul, in said dist., Oct. 3d, 1872, and served the same on Eben Mayall, personally, at St. Paul, in said dist., Oct. 5th, 1872.

AUG. ARMSTRONG,
U. S. Marshal.
By R. R. CLEVELAND, *Dep'y.*

Fees, $4.12.

16 And afterwards, to wit, at rules held at the clerk's office of said court on the fourth day of November, in the year of our Lord one thousand eight hundred and seventy-two, the following proceeding, among others, was had, to wit:

WILLIAM M. MCCARTY
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CHARLES A. MANN AND EBBEN MAYALL. } In equity.

And now come the defendants, by Geo. L. Otis, esq., their solicitor, on whose motion it is ordered that the appearance of the said defendants be, and the same is hereby, entered.

And afterwards, to wit, on the 28th day of January, in the year of our Lord one thousand eight hundred and seventy-three, and filed in said clerk's office their answer to the plaintiff's bill of complaint, which answer is in writing, and in the words and figures following, viz:

17 *Joint & several answer of def'ts.*

Circuit court of the United States, district of Minnesota. In equity.

WILLIAM M. MCCARTY, COMPLAINANT,
vs.
CHARLES A. MANN AND EBEN MAYALL, DEFENDANTS.

The joint and several answer of Charles A. Mann and Eben Mayall, the defendants, to the bill of complaint of William M. McCarty, the complainant.

These defendants, now and at all times hereafter saving and reserving to themselves and each of them all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for said answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them or either of them to make answer unto, these defendants, severally answering, say:

They admit that the residence of the complainant and of the defendants as charged in the bil' of complaint. They also admit that the United States was the owner of the tract of land described in
18 said bill at the time therein stated, to wit, on the 3d day of March, 1849.

Further answering, these defendants admit that on the 12th day of January, 1850, the said Peter Poncin, then being the owner of a certain land-warrant as in said bill alleged, applied to the proper officers of the land-office of the United States for the Stillwater land-district, in the then Territory of Minnesota, to locate said land-warrant upon the south half of the northeast quarter and the north half of the southeast quarter of said section thirty-six, (36,) containing 160 acres of land, and embracing the land above described, and that such entry and location was thereupon allowed by said land-officers, and that a certificate by them, under their hands, of such location and entry, bearing date on that day, in the usual form, was issued by the said land-officers to the said Poncin; but whether said lands so entered were then subject to such entry and location, or whether the same were by law previously withdrawn from such entry and location, or appropriated or set apart for the aid of schools of Minnesota, or whether such location and were allowed without authority of law, or whether the United States continued to be the owner of said lands until the same were granted and conveyed under the provisons of the said act of Con-
19 gress of July 27, 1854, these defendants cannot of their own knowledge state as to their belief or otherwise, and leave the complainant to his proofs as to said matters and each and every of them.

Further answering, these defendants admit the making, execution, and recording of the two deeds, the one from the said Peter Poncin to the said Antoine Pepin, dated the 28th day of March, 1850, and recorded April 2, 1850, in book A of deeds, at page 268, and the other from the

said Antoine Pepin to the said Alpheus R. French, dated the 29th day of March, 1850, and recorded on the 15th day of January, in book B of deeds, on page 144, and which said deeds were for the consideration and purported to convey the premises, and contained the covenants and were of the tenor and effect respectively as set forth in said bill of complaint; and they admit the cancellation of said entry by the Commissioner of the General Land-Office, as in said bill of complaint alleged; but whether the said land-warrant was thereupon or at any time withdrawn from the possession of the officers of the United States by the said Poncin, or whether the same was restored to him as in said bill of complaint alleged, or otherwise, these defendants know not, and have not been informed save by said complainant's said bill of complaint.

20 Further answering, these defendants admit that after the said cancellation, and on the 24th day of July, 1854, the Congress of the United States passed an act entitled "An act authorizing a patent to be issued to Peter Poncin for certain lands therein described," and which said act was in the words following, viz:

"That the entry by Peter Poncin of the north half the southeast quarter, and the south half of the northeast quarter of section thirty-six, in town. 29, of range 23, in the Stillwater land-district, Minnesota, cancelled by the Commissioner of the General Land-Office, be, and the same is hereby, allowed and re-instated as of the date of said entry, so that the title to said lands may enure to the benefit of his grantees as far as he may have conveyed the same: Provided, That the money paid for said lands shall not have been withdrawn; or, if withdrawn, shall be again paid at said land-offices, and that thereupon a patent shall issue in the name of said Peter Poncin for said lands;" and that afterwards, on the 24th day of March, 1855, the United States, in accordance with said act of Congress, and in pursuance of the laws, rules, and regulations for such case made and provided, executed and delivered unto the said Poncin their patent in due form of law, bearing date on that day, whereby they duly conveyed said lands to him in fee-simple,

21 but for the use and benefit of the grantees of the said Poncin, as by said act provided, and which patent was recorded as in said bill of complaint alleged.

Further answering, the defendants allege that on the 19th day of April, 1850, the said Alpheus R. French, for a valuable consideration to him in hand paid by one Louis C. Elfelt and one Charles D. Elfelt, bargained, sold, and agreed to convey said premises to said Louis C. Elfelt and Charles D. Elfelt, and, to carry out the said bargain and sale, gave to the said Louis C. and Charles D. Elfelt a certain bond or agreement in writing, whereby, upon the delivery by the said Elfelts to the said French of certain personal property of the value of five hundred dollars, as soon as practicable thereafter, he, the said French, agreed to make, execute, and deliver to the said Elfelts, their heirs and assigns, a good and sufficient deed of the said premises, and therein to warrant and assure the same to them, free from all incumbrances, and provided a good patent-title to said premises should be given by the United States to the said Peter Poncin, and which said bond or agreement was duly recorded in the office of the register of deeds for said county of Ramsey, on the said 19th day of April, 1850, in book A of mortgages, at page 59; that afterwards, on the 19th day of March, A. D. 1851, the said Elfelts, having duly complied with the said bond or agreement in writing on their part, and pursuant to the same, and to carry out

22 the same, the said Alpheus R. French made, executed, duly acknowledged, and delivered to the said Louis C. Elfelt and Charles

D. Elfelt a deed of conveyance, whereby, in consideration of the sum of five hundred dollars to him in hand paid by the said Louis C. and Charles D. Elfelt, he did grant, bargain, sell, release, remise, quit-claim, and convey to the said Louis C. Elfelt and Charles D. Elfelt, and to their heirs and assigns forever, all and singular the said premises firstly described in the complainant's said bill, and which said deed was duly recorded in the office of the register of deeds for said county of Ramsey, on the 20th day of March, 1851, in book B of deeds, on page 251; that, in the recording of said deed as aforesaid, the register of deeds, by mistake and inadvertence, omitted from the said record the southwest quarter of said northeast quarter, containing forty acres, and in the said record described the said premises as consisting only of the west half of the southeast quarter of the northeast quarter, and the northwest quarter of the southeast quarter of said section 36; that afterwards, and on the 4th day of February, 1857, the said deed was recorded in said register of deeds' office, in book Q of deeds, at page 202, whereby the aforesaid mistake and error in said record was corrected; that a portion of the lots set forth in said bill, as claimed
23 by these defendants, are on the said forty-acre tract so omitted from the said record.

That afterwards, on the 13th day of October, 1853, the said Lewis C. Elfelt and Charles D. Elfelt, for a valuable consideration to them in hand paid by one Isaac Van Etten, duly executed, acknowledged, and delivered to him a deed of conveyance, whereby they did duly bargain, sell, and convey to the said Van Etten certain portions of the premises firstly described in same bill of complaint, including all the lots and blocks described in said bill, in and to which these defendants claim an estate and interest, and which said deed was duly recorded in the office of the register of deeds aforesaid on the 22d day of October, 1853, in book E of deeds, at page 35; and that afterwards and on the 19th day of October, 1854, the said Lewis C. Elfelt and Charles D. Elfelt, for a valuable consideration to them in hand paid by the said Van Etten, duly executed, acknowledged, and delivered to him a further deed of conveyance, whereby they did duly bargain, sell, and convey to the said Van Etten certain portions of said firstly described premises, and also including all the lots, blocks, and premises claimed by the defendants as in said bill of complaint alleged, and which said deed was duly recorded in
24 said register of deeds' office on the 19th day of October, 1854, in book K of deeds, at page 166;

That, on the 30th day of January, 1851, the said Antoine Pepin, for a valuable consideration to him in hand paid by one Henry M. Rice, duly executed, acknowledged, and delivered to him a deed of conveyance, whereby he did bargain, sell, and convey to the said Rice all of his right, title, and interest in and to the south half of the northeast quarter of said section 36, upon which tract are situated the premises so claimed by these defendants, and which said deed was duly recorded in the office of the register of deeds aforesaid on the 1st day of February, 1851, in book B of deeds, at page 177; and afterwards, on the 20th day of March, 1851, the said Henry M. Rice, for a valuable consideration to him in hand paid by the said Lewis C. Elfelt and Charles D. Elfelt, duly executed, acknowledged, and delivered to them a deed of conveyance, whereby he did bargain, sell, and convey to them all of his right, title, and interest in and to said premises so firstly described in said bill of complaint, and which said deed was recorded in said register of deeds' office on the 20th day of March, 1851, in book B of deeds, at page 247;

That afterwards, and prior to the 2d day of July, 1855, the said Isaac

Van Etten, for a valuable consideration to him in hand paid by one Daniel A. Robertson, duly executed, acknowledged, and delivered to
25 said Robertson two certain deeds of conveyance—the one dated March 24, 1854, and the other dated Oct. 24, 1854—whereby he did bargain, sell, and convey to said Robertson one equal undivided half part or portion of all and singular his interest in that part of said premises firstly described in said bill of complaint so claimed by these defendants, and said deeds are recorded in said register of deeds' office—the one in book G of deeds, at page 361, and the other in book I of deeds, at page 419;

That afterwards, and on the 2d day of July, 1855, the said Isaac Van Etten and Daniel A. Robertson, being lawfully seized of the real estate so conveyed to them as aforesaid, duly surveyed and platted the same into lots and blocks, as an addition to the city of St. Paul, under the name of "Robertson & Van Etten addition to St. Paul," and which said plat was by them duly executed and acknowledged, and on the said 2d day of July, 1855, was duly recorded in the said register of deeds' office, in book C of town-plats, on page 2, and which said addition comprises about thirty acres of land, a part of the premises firstly described in said bill of complaint.

Further answering, these defendants admit that on the 14th day of June, A. D. 1856, and not on the 24th day of January, 1856, as alleged in said bill of complaint, the said Alpheus R. French did make,
26 acknowledge, and deliver to one P. P. Furber two certain deeds of conveyance, by the one of which deeds he did pretend to convey to said Furber the southwest quarter of the northeast quarter, and the west half of the southeast quarter of the northeast quarter of said section 36, on which premises are situated the lots and blocks so claimed by these defendants, and which deed was duly recorded in said register of deeds' office on the said 14th day of June, 1856, in book M of deeds, at page 942, and which deed purported to be for a consideration of one hundred dollars, and by the other of which deeds the said French did pretend to convey to the said Furber the northwest quarter of the southeast quarter of said section thirty-six, (36,) and which deed purported to be for a consideration of $150, and was recorded in said office on the said 14th day of June, 1856, in book N of deeds, on page 611, but these defendants allege the fact to be that the said last-named deeds, and each of them, were so made without any consideration whatever, or for a consideration merely nominal, and that the said Furber, at the time he took the said deeds respectively, had full knowledge and notice that the said French had previously conveyed said premises to said Louis C. Elfelt and Charles D. Elfelt by the deed dated March 19, 1851, and hereinabove described, and had full knowledge and
27 notice that it was by the mistake and inadvertence of the register of deeds that the forty-acre tract was omitted in the recording of the said deed, and the said deed actually embraced and covered the said forty-acre tract; and they further say that they are informed, and believe it to be true, and so allege the fact to be, that the complainant, W'm M. McCarty, procured the aforesaid deeds from the said French to the said Furber, and each of them, to be executed as aforesaid without paying any consideration therefor, or a consideration merely nominal; that he had full knowledge and notice at the time when said deeds were so executed that the said deed from the said French to the said Louis C. and Charles D. Elfelt in fact covered and conveyed the said forty-acre tract, and that the omission of the said forty-acre tract from the record as aforesaid was purely an accident and occurred by the inadvertence

and mistake of said register of deeds as aforesaid, and that he so procured the same to be executed with the fraudulent intent and purpose of cheating and defrauding the said Robertson and Van Etten and their grantees, these defendants, out of the said forty-acre tract; that the said complainant was the real party in interest in the said fraudulent transaction, and that the deeds from said Furber to said Dunn,
28 described in said bill of complaint, and the pretended deeds from said Dunn to said Hammond, and from said Hammond to himself, described in the complaint, if any such deeds were ever in fact executed, were so executed for the sole benefit of the said complainant, and as a part and parcel of said fraudulent scheme, and the complainant caused the said deeds to be so made from the said Furber to the said Dunn and from the said Hammond to himself, to disguise the transaction and conceal his aforesaid fraudulent purpose and intent.

These defendants admit that, on the 28th day of June, 1855, the said Furber and wife made a certain deed whereby they pretended to convey to the said John P. Dunn the said premises firstly described in the bill of complaint, and which said deed purported to be for a consideration of $150, and was recorded in said office on the 1st day of July, 1856, in book N of deeds, at page 664, and they admit that said John P. Dunn and wife, on the 31st day of July, 1856, made and acknowledged a certain deed to one Abram H. Hammond, whereby they pretended to convey to said Hammond the said northwest quarter of the southeast quarter of said section 36, and that the said deed was recorded as alleged in said bill of complaint, but they are not informed, save by the complainant's bill, and cannot state upon information or belief,
29 or otherwise whether, on the 31st day of July, 1856, or at any other time, the said Dunn and wife executed or acknowledged a certain or any other deed of conveyance, whereby they conveyed, or pretended to convey, to said Hammond the rest and residue of said lands as alleged in said bill or otherwise; or whether on the 20th day of September, 1862, or at any other time, the said Hammond and wife executed or acknowledged a certain or any deed to complainant, whereby they conveyed or pretended to convey to the complainant all or any of the lands firstly described in said bill of complaint, as alleged in said bill of complainant or otherwise; but they allege that no such deeds have ever been recorded in said register of deeds' office; and they further allege that they are informed and believe, and so state the fact to be, that the said deed from the said Furber to the said Dunn, and the said first-described deed from said Dunn to said Hammond, and the said pretended secondly-described deed from said Dunn to said Hammond, and the pretended deed from said Hammond to the complainant, if any such deeds as the last two were in fact ever executed, were each and every of them so executed and acknowledged without any consideration, or for a consideration merely nominal, and that the said Dunn and the said Hammond,
30 and the complainant, and each and every of them, when they took said respective conveyances, had full knowledge and notice that the said deed from said French to said Elfelts hereinabove described covered and embraced the said forty-acre tract above described, and that the said forty acres in fact had been conveyed by the said French to the said Louis C. and Charles D. Elfelt by the said deed of March 19, 1851, and that the said Elfelts were in fact the lawful owners of said forty-acre tract in fee under the said bond, and under the said deed of conveyance last aforesaid, and that the said forty-acre tract was omitted from the record of the said deed by the mistake and inadvertence of said register of deeds, and that each and every of said parties, to wit,

the said Furber, and the said Dunn, and the said Hammond, took their said respective deeds at the instance of the complainant, and for his sole benefit, and to enable him to cary out his fraudulent design as aforesaid of defrauding the said Van Etten and Robertson, and these defendants, their grantees, out of their said property, by reason of said mistake in the record of said deed as aforesaid; that the said respective deeds were all merely deeds of quit-claim and release, and purported to convey only the interest of said respective grantors, and contained no covenants, and the consideration therein expressed was grossly in-
31 adequate and inconsiderable as compared with the actual value of said lands.

These defendants further allege that afterwards, on the 30th day of January, 1858, the said Daniel A. Robertson and Isaac Van Etten, being in the actual possession of so much of said forty-acre tract so omitted from said record as is covered by said Robertson & Van Etten's addition to St. Paul, and comprising all the premises claimed by these defendants, duly commenced an action in the district court for the 2d judicial district, county of Ramsey and State of Minnesota, against the said P. P. Furber and the said John P. Dunn, having for its object the cancellation of the deeds from the said French to the said Furber, and from the said Furber to the said Dunn, and to have the title to said premises quieted in the said Robertson & Van Etten, plaintiffs in said action, and in which action a complaint was duly filed and a summons issued, and was duly served on the said P. P. Furber and John P. Dunn, the defendants in said action. And thereupon such proceedings were afterwards had in the said action, that a judgment was duly entered therein on the 25th day of August, 1858, in favor of the plaintiffs therein, and against both of the defendants therein, the said Furber and the said Dunn, whereby it was, among other things, adjudged by the said court that the said Isaac Van Etten and Daniel
32 A. Robertson were the owners in fee-simple of all and singular the said premises, and entitled to and in possession thereof; that the said deed from said French and wife to said Furber, bearing date June 14, 1856, and purporting to convey the said forty-acre tract so omitted from said record, was null and void, and of no effect, so far as the same relates to and includes the premises above described, as the subject-matter of said action, and that the same was made and executed fraudulently and without consideration, and in fraud of the rights of the plaintiffs in said action; that the said deed from the said Furber to the said Dunn, bearing date June 28, 1856, purporting to convey to said Dunn the said forty acres, and the other premises firstly described in said bill of complaint, was null and void and of no effect, so far as the same relates to and includes the premises aforesaid, which were the subject of said action, and that the same was without consideration and in fraud of the rights of the said Robertson and Van Etten, plaintiffs in said action; that the said judgment be recorded in said register of deeds' office, and that the title to said premises vest in the said Robertson and Van Etten, plaintiffs in said action, without any further act or deed on their part, or the part of the said defendants in said action.

All of which will more fully appear by reference to the records
33 and files in the said action, which these defendants are ready and willing to produce as this hon. court may direct; and that afterwards, and on the 26th day of August, 1858, the said judgment was duly recorded in said register of deeds' office, in book A of miscellaneous, on page 60.

Further answering, the defendants state that they have purchased in good faith, of Robertson & Van Etten and others, the lots which are the subject of this suit, paying full value therefor, and having no notice or knowledge of the unrecorded deeds above mentioned; and that, by sundry deeds, with full covenants of warranty and seizure from and through sundry grantors, said lots have been granted and conveyed to these defendants; all of which deeds have been duly recorded in said register's office; said deeds being as follows, to wit:

Deed from D. A. Robertson and wife to Isaac Van Etten, dated August 25, 1858, recorded in U, of deeds, page 43, and conveying block 3; lot 1, in block 6; lots 10 and 11, in block 7; blocks 12 and 29, and lot 12, in block 21.

Also by the same grantors to the same grantees, deed dated Dec. 26, 1857, recorded Dec. 26, 1867, in S of deeds, page 514, conveying block 4.

Deed of Isaac Van Etten and wife to Charles H. Oakes, dated Nov. 28, 1859, recorded Nov. 29, 1859, in W of deeds, page 462,
34 conveying lots 1, 2, 3, 4, and 5, in block 3; lots 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, & 12, in block 4; the undivided ½ of lot 1, in block 6; lots 10 and 12, in block 7; lots 1, 5, 6, 7, 8, 9, 10, 11, & 12, in block 12; lots 1 & 12, and undivided ½ of lots 2, 3, 4, 7, 8, 9, 10, & 11, in block 21; undivided ½ of lot 9 in block 22, and all of block 29.

Deed of Charles H. Oakes and wife to Joseph W. Gott, dated Feb. 8, 1864, recorded March 3, 1864, in D D of deeds, page 134, conveying block 4, except lot 8; lots 1 & 2, in block 3, and all of block 29.

Deed of J. W. Gott and wife to Cha's A. Mann, defendant herein, dated June 23, 1868, recorded June 23, 1868, in R R of deeds, page 23, conveying same premises as in last preceding deed.

Deed of Isaac Van Etten & wife to H. D. Gurney, dated Aug. 27, 1859, recorded Aug. 27, 1859, in W of deeds, page 73, conveying undivided ½ of block 6, except lot 2; lots 1, 2, 3, 4, 7, 8, 9, 10, 11, & 12, in block 11; and lots 10, 11, & 12 in block 22.

Deed of Henry D. Gurney to Jane O. Van Etten, wife of Isaac Van Etten, dated May 5, 1858, recorded June 6, 1858, in O O of deeds, page 168, conveying the same premises as in the last preceding deed.

Deed of Charles H. Oakes and wife to Jane O. Van Etten, dated May 8, 1866, recorded May 8, 1866, in K K of deeds, page 260, conveying lots 3, 4, & 5 in block 3; undivided ½ of lot 1, in block 6; all of lot 10, in block 7; lots 1, 5, 6, 7, 8, 9, 10, 11, & 12, in block 12; lots 1
35 & 12, in block 21; undivided ½ of lot 7, in block 22; undivided ½ of lots 2, 3, 4, 7, 8, 9, 10 &, 11, in block 21.

Deed of Isaac Van Etten and Jane O., his wife, to Cha's A. Mann, defendant herein, dated June 5, 1868, recorded June 6, 1868, in M M of deeds, page 619, conveying lots 3, 4, & 5, in block 3; lot 1, in block 6; lots 10 & 12, in block 7; lots 1, 5, 6, 7, 8, 9, 10, 11, & 12, in block 12; undivided ½ of lots 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12, in block 6; undivided ½ of lots 1, 2, 3, 7, 11, & 12, in block 11; undivided ½ of lots 11 & 12, in block 22; and undivided ½ of lots 2, 3, 4, 7, 8, 9, 10, & 11, in block 21.

Deed of D. A. Robertson & wife to Cha's A. Mann, defendant herein, dated June 11, 1868, recorded June 11, 1868, in R R of deeds, page 6, conveying undivided ½ of lots 3, 4, 5, 6, 7, 8, 9, 10, 11, & 12, in block 6; undivided of lots 1, 2, 3, 4, 7, 11, & 12, in block 11; undivided ½ of lots 9, 10, 11 & 12, in block 22; and undivided ½ of lots 2, 3, 4, 7, 8, 9, 10, & 11, in block 21.

Deed of D. A. Robertson and wife and Isaac Van Etten to Edward H. Hawke, dated September 7, 1855, recorded October 19, 1855, in L of deeds, page 639, conveying lots 2, 3, & 4, in block 12.

Deed of Edward H. Hawke and wife to Jos. Christopher, dated October 22, 1856, recorded November 3, 1856, in O of deeds, page 536, conveying the same as in preceding deed.

36 Deed of Joseph Christopher and wife to James W. Christopher, dated November 13, 1857, recorded January 23, 1858, in S of deeds, page 586, conveying same premises as in the two preceding deeds.

Deed of James W. Christopher to Edward Tompkins, dated January 15, 1858, recorded April 28, 1868, in P P of deeds, page 493, conveying same premises as in three preceding deeds.

Deed of Edward Tompkins and wife to H. R. Bigelow, dated April 25, 1866, recorded April 28, 1868, in Q Q of deeds, page 283, conveying the same premises as in the four preceding deeds.

Deed of H R. Bigelow & wife to Cha's A. Mann, defendant herein, dated June 8, 1868, recorded June 10, 1868, in O O of deeds, page 177, conveying same premises as in five preceding deeds.

Deed of Louis C. and Cha's D. Elfelt to Cha's A. Mann, defendant herein, dated July 11, 1868, recorded in O O of deeds, page 206, July 14, 1868, conveying all the premises which are the subject of this suit.

Deed of Cha's A. Mann and Eben Mayall to Mary A. Mayall, dated September 15, 1871, and recorded April 11, 1872, in W W of deeds, page 524, conveying lots 4 & 5, in block 3; lots 5 & 12, in block 4; lots 5, 8, & 12, in block 6; lots 4 & 12, in block 11; lots 5, 8, & 12, in block 12; lots 8, 9, & 12, in block 21; lots 8 & 12, in block 29.

37 Deed of Samuel Mayall and Mary A., his wife, to Eben Mayall, dated June 22, 1872, recorded August 14, 1872, in 55 of deeds, page 176, conveying same premises as in last preceding deed.

Deed of Cha's A. Mann, and Samuel Mayall and Mary A. Mayall, his wife, to Eben Mayall, dated September 15, 1871, recorded June 17, 1872, in "53" of deeds, page 455, conveying lot 3, in block 3; lots 2, 7, & 11, in block 4; lots 6 & 9, in block 6; lots 10 & 12, in block 7; lots 3 & 7, in block 11; lots 2, 7 & 11 in, block 12; lot 11, in block 22; lots 2 & 7, in block 21; lots 2, 7 & 11, in block 29. All of the lots and blocks in the preceding deeds being in Robertson and Van Etten's addition to St. Paul, according to the recorded plat thereof, and all of said deeds were recorded at the times and in the books and pages of the records of Ramsey Co. register's office, as above specified.

These defendants, further answering, say that the premises firstly described in the bill of complaint, being the same premises so conveyed by the said French to the said Elfelts, by deed dated March 19, 1851, have all been platted and laid out into additions to St. Paul by parties claiming title under the said Elfelt deed, and that said premises have become of great value, to wit, of the value of from three to five

38 hundred thousand dollars; that a large number of the lots so laid out and platted in said additions have been improved, and are occupied by parties who hold the same under the said Elfelt title; that no portion of said premises has ever been held or occupied by any one claiming under the complainant's said title; that the holders under said Elfelt title have always paid and are still paying all taxes and assessments against said premises; that no claim has ever been made to said premises so firstly described in said complaint, or any part thereof, by either the said Furber, or by the said Dunn with said Hammond, nor has the complainant ever made such claim until about the time of the commencement of this action; that improvements of great value have from time to time during the last fourteen years been put upon said premises by parties claiming under the said Elfelt title, with the full

knowledge of the complainant and his last-named grantors, and without any objection on their part or notice of any claim of title by them whatever beyond the record of the said deeds to Furber, and to said Dunn; and these defendants insist that by reason of his laches and negligence in asserting his said pretended title he has lost and forfeited all
39 right to relief from this court, if any such right he ever had.

Further answering, these defendants deny that the complainant is the owner or entitled to possession of said premises or any part thereof, as alleged in said bill of complaint or otherwise.

And these defendants admit the platting of a portion of said premises into Robertson & Van Etten's addition to St. Paul, as in said bill of complaint alleged and as herein above stated, and they admit that they claim some estate or interest adverse to the complainant in those parts or portions of said lands firstly described in said bill of complaint, as alleged in said bill of complaint, to wit, in those lots and blocks specifically described in said bill of complaint, and that the said lots and blocks are worth more than two thousand dollars, and that they are vacant and unoccupied lands; but they deny that defendants have not any rightful title, claim, or interest in said parcels, and insist that they own and hold the same in fee-simple, and are entitled to the possession thereof.

And these defendants further answering allege that the pretended claim of title to said premises by the complainant operates as a cloud upon their title, and depreciates its value and prevents them selling or disposing of the same, and from having the free use and enjoy-
40 ment thereof.

Wherefore they pray further decree of this court that the said deeds from the said French to the said Furber, and from the said Furber to the said Dunn, and from the said Dunn to the said Hammond, and from the said Hammond to the complainant, be each and every of them *be* adjudged fraudulent and void as against these defendants, and that the cloud thereby cast upon the title of these defendants be removed, and that the said complainant and all persons claiming or to claim by, through, or under him may be forever enjoined from making any claim of title to said premises, or any portion thereof as against these defendants, and that the complainant be denied the relief claimed in his bill and take nothing by this action, and for such other or further relief or both in the premises as may be just and equitable.

And these defendants deny that any other matter, cause, or thing in the said bill of complaint contained, material or necessary for the defendants to make answer unto, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of these defendants; all which matters
41 and things these defendants are ready and willing to aver and prove as this honorable court shall direct, and they pray judgment as above, and for their reasonable costs and charges in this behalf most wrongfully sustained.

EBEN MAYALL.
CHA'S A. MANN.

GEO. L. OTIS,
Sol'r & of Counsel for the Defendants.

DISTRICT OF MINNESOTA, *ss:*

Eben Mayall, of said district, being duly sworn, says that he is one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; and that what is

contained in the foregoing answer, so far as relates to his own act and deed, is true to his own knowledge; and what relates to the act and deed of any other person he believes it to be true.

EBEN MAYALL.
CHA'S A. MANN.

Subscribed and sworn to before me this 28th day of January, 1873.
H. E. MANN, *Clerk.*

42 And afterwards, to wit, on the third day of April, in the year our Lord one thousand eight hundred and seventy-three, there came the said plaintiff, by his said solicitors, and filed in the clerk's office of said court his amendments to his bill of complaint herein, with the stipulation of the parties to this suit in regard to the same; which amendments and stipulation are in writing, and in the words and figures following, viz:

43 Circuit court of the United States for the district of Minnesota.

WILLIAM M. McCARTY
ags't
CHARLES A. MANN AND EBEN MAYALL.

Proposed amendment to bill of complaint.

After the words "whereby they conveyed unto your orator, and unto his heirs and assigns forever, all the lands first hereinbefore described," insert the words, "that the said deed to your orator was made, executed, acknowledged, and delivered in the State of Indiana, and in all respects according to the laws thereof; that by the laws of said State of Indiana in force at the time of the making, execution, acknowledgement, and delivery of said deed, it was not required that the same should be executed in presence of nor attested by any witness or witnesses in order that the same should be a good, valid, and sufficient deed of conveyance of real estate, and that by the laws of such State at such time any deed of conveyance of lands within such State not having been executed in the presence of nor signed by any witness to the execution thereof, would have been a good, valid, and effectual conveyance
44 of such lands."

It is hereby stipulated that the bill in said action may be considered as, and hereby is, amended as above proposed; and that the defendants' answer now on file shall stand as the answer to the bill as amended; and that the matter of such amendment shall be deemed to be fully put in issue without any other or further act on the part of the defendants, or of either of them.

Dated April 3d, 1873.

GEO. L. OTIS, *Sol'r for Def'ts.*
J. M. GILMAN & W. P. CLOUGH,
Sol'rs for Plaintiff.

And afterwards, to wit, on the third day of April, in the year of our Lord one thousand eight hundred and seventy-three, came the said plaintiff, by his said solicitors, and filed his replication to the answer of the defendants in said clerk's office, which replication is in writing, and in the words and figures following, viz:

45 Circuit court of the United States for the district of Minnesota

WILLIAM M. McCARTY
vs.
CHARLES A. MANN AND EBEN MAYALL.

The replication of William M. McCarty, plaintiff, to the joint and several answer of Charles A. Mann and Eben Mayall, defendants.

This repliant, saving and reserving unto himself all and all manner of advantage of exceptions to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, is true.

All which matters and things this repliant is and will be ready
46 to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

J. M. GILMAN AND
W. P. CLOUGH,
Plff's Sol'rs.

And afterwards, to wit, at rules held at the clerk's office of said court, on the 7th day of June, A. D. 1873, the following proceeding, among others, was had, viz:

WILLIAM M. McCARTY
vs.
CHARLES A. MANN & EBBEN MAYALL.

And now come the defendants, by Geo. L. Otis, esq., their solicitor, on whose motion it is ordered that this cause be, and it is hereby, set down for hearing at the next general term of this court, to be held at the city of Saint Paul, in said district, on the third Monday, being the 16th day of June, in the year of our Lord one thousand eight hundred and seventy-three, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

And afterwards, to wit, on the 27th day of June, A. D. 1873, came the parties to said suit, by their said solicitors, and filed in the clerk's office of said court an agreed statement of the facts in the case; which statement is in writing, and in the words and figures following, viz:

47 *Statement of facts agreed to by the parties.*

United States circuit court, district of Minnesota, in equity.

WILLIAM M. McCARTY
vs.
CHARLES A. MANN AND EBEN MAYALL.

For all the purposes of this action, the following statement of facts is admitted to be true, and shall be read on the final hearing as part of the case herein, viz:

On the 3d day of March, 1849, and prior thereto, the United States were the owners, as part and parcel of their public lands, of the following-described real estate, now situate and being within the corporate limits of the city of St. Paul, in the county of Ramsey, and State of Minnesota, known and designated as the southwest quarter of the southeast quarter, and the west half of the southeast quarter of the northeast quarter, and the northwest quarter of the southeast quarter of section thirty-six, (36,) in town. twenty-nine, (29,) of range twenty-three, (23,) according to the United States Government survey, containing 100 acres of land.

On the 13th day of February, 1850, one Peter Poncin, then being
48 the owner of a certain military land-warrant entitling the owner thereof to 160 acres of the public lands of the United States not otherwise appropiated or set apart, applied to the proper officers of the United States land-office, for the Stillwater land district, of the then Territory of Minnesota, to locate the said land-warrant upon the south half of the northeast quarter, and the north half of the southeast quarter of said section thirty-six, (36,) containing 160 acres of land, and embracing the premises herein first above described with such warrant; that such entry and location were thereupon allowed by said officers, and a certificate of such location and entry was thereupon and on the same day issued by them to the said Poncin in the usual form.

That afterwards, on the 28th day of March, 1850, the said Poncin, in consideration of the sum of one hundred and fifty dollars to him paid by one Antoine Pepin, duly executed, acknowledged, and delivered to said Pepin his deed of conveyance, being a deed of warranty, with the usual covenants, bearing date on that day, wherein and whereby he purported to convey unto the said Pepin, and to his heirs and assigns forever, all the lands first herein above described, and in and by said deed,
49 for himself, his heirs, and assigns, covenanted among other things to and with the said Pepin, his heirs and assigns, that the said Poncin was well seized in fee of said premises, and had good right to sell and convey the same in manner and form aforesaid, and that he, the said Poncin, his heirs and assigns, would forever warrant and defend the said Pepin, his heirs and assigns, in the peaceable and quiet possession and enjoyment of all the lands first herein above described against any and all persons claiming or who might claim said lands, or any part thereof, and said deed of conveyance was afterwards, on the 2d day of April, 1850, duly recorded in the office of the register of deeds in and for said county of Ramsey, in book A of deeds, on page 268.

That afterwards, and on the 29th day of March, 1850, in consideration of the sum of one hundred dollars to him paid by one Alpheus R. French, the said Antoine Pepin made, executed, acknowledged, and delivered in due form of law to said French his deed of conveyance, being a deed of warranty, with the usual covenants, wherein and whereby he purported to convey unto the said French, and unto his heirs and assigns forever, all the lands first herein above de-
50 scribed, and in and by said deed, for himself, his heirs and assigns, covenanted among other things to and with the said French, his heirs and assigns, that he, the said Pepin, was well seized in fee of the aforesaid premises, and had good right to sell and convey the same in manner and form as above written, and that the said Pepin, his heirs and assigns, would forever warrant and defend the said French, his heirs and assigns, in the peaceable and quiet possession and enjoyment of all the lands first hereinbefore described against all per-

sons claiming or who might claim the same, or any part thereof; which deed of conveyance, after the execution thereof, and on the 15th day of January, 1851, was recorded in the office of said register of deeds in book B of deeds, on page 144.

That on the 19th day of April, 1850, the said Alpheus R. French executed under his hand and seal, and delivered to one Louis C. Elfelt and one Charles D. Elfelt, a certain bond or instrument in writing in the words and figures following, viz:

"Know all men by these presents, that I, Alpheus R. French, of the county of Ramsey and Territory of Minnesota, am held and firmly bound unto Lewis C. Elfelt and Charles D. Elfelt, of the same
51 county and Territory, in the sum of five hundred dollars, to be paid to the said Lewis C. Elfelt and Charles D. Elfelt, their executors, administrators, or assigns, to which payment, well and truly to be made, I do bind myself, my heirs, executors, and administrators firmly by these presents.

"In witness whereof I have hereunto set my hand and seal the nineteenth day of April, A. D. 1850.

"Whereas the said A. R. French has agreed to sell and convey to the said Elfelts a certain tract or parcel of land situate, lying, and being in the county of Ramsey and Territory of Minnesota, and described as follows, to wit: the northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter, and the west half of the southeast quarter of the northeast quarter of section number thirty-six, (36,) township number twenty-nine (29) north, of range number twenty-three (23) west, of 4th meridian, and containing one hundred (100) acres, and the said Elfelts, in consideration thereof, have given to the said A. R. French a bond for the sum of five hundred dollars, for the faithful delivery of a good stock of saddlery, harness, &c., &c., valued at five hundred dollars, as soon as practicable after the
52 execution of this instrument.

"Now the consideration of this obligation is such that if after the performance of said agreement, and at the request of said Elfelts, the said French shall make and execute to the said Elfelts, their heirs and assigns, and deliver to the same a good and sufficient deed of conveyance of the premises, and therein warrant and assure the same to them free from all incumbrances, provided a good patent-title is given by the United States Government to Peter Poncin, the original purchaser, then this obligation to be void; otherwise to remain of full force and virtue.

"ALPHEUS R. FRENCH. [SEAL.]

"Signed, sealed, and delivered in presence of—
"B. W. LOTT.
"D. DAY."

That the aforesaid bond was not acknowledged, but the same was recorded in the office of the register of deeds for said county of Ramsey, on the nineteenth day of April, 1850, in book A of mortgages, on page 59.

That afterwards, on the 19th day of March, A. D. 1851, the said Elfelts having duly complied with the said bond or agreement in writing on their part, and pursuant to the same, and to carry out the same, the said Alpheus R. French and wife made, executed, duly
53 acknowledged, and delivered to the said Louis C. Elfelt and Charles D. Elfelt a deed of conveyance, in words and figures following; that is to say:

"This indenture, made and entered into this nineteenth day of March, in the year of our Lord one thousand eight hundred and fifty-one, by and between Alpheus R. French and Mary Ann, his wife, of the county of Ramsey and Territory of Minnesota, of the first part, and Lewis C. Elfelt and Charles D. Elfelt, of the county of Ramsey, and Territory of Minnesota, of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of five hundred dollars to them in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has remised, released, and forever quit-claimed, and by these presents does remise, release, and forever quit-claim unto the said parties of the second part, and to their heirs and assigns forever, all of their right, title, interest, estate, claim, and demand, both in law and equity, and as well in possession as in expectancy, of, in, and to all that piece or parcel of land situate, lying, and being in the county of Ramsey and Territory of Minnesota, and known and designated as follows, viz:

"The northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter, and the west half of the southeast quarter of the northeast quarter of section thirty-six, (36,) township twenty-nine (29) north, of range twenty-three (23) west of the fourth principal meridian, containing one hundred (100) acres, together with all and singular the rights, privileges, hereditaments, and appurtenances thereunto belonging, to have and to hold the premises above mentioned and described to the said parties of the second part, and to their heirs and assigns forever.

"In witness whereof, the said parties of the first part have hereto set their hands and seals the day and year first above written.

"ALPHEUS R. FRENCH. [SEAL.]
"MARY ANN FRENCH. [SEAL.]

"Signed, sealed, and delivered in presence of—
"F. N. GRENCHY.
"W. P. MURRAY.

"TERRITORY OF MINNESOTA,
"*County of Ramsey, ss:*

"Be it known that on this 19th day of March, A. D. 1851, before the undersigned, personally came Alpheus R. French and Mary Ann, his wife, the grantors to the foregoing and within deed, from them as such grantors, to L. E. and C. D. Elfelt, to me personally known to be the identical persons described in and who executed the said deed, and they acknowledged that they executed the said deed freely and voluntarily for the uses and purposes therein expressed.

"W. P. MURRAY,
"*Notary Public, Ramsey Co., Minn'a Terr.*"

That the aforesaid deed was duly recorded in the office of the register of deeds for the county of Ramsey on the 20th day of March, A. D. 1851, in book B of deeds, at page 251.

That in recording the said last-named deed as aforesaid, by an accident and mistake of the register of deeds making such record, the aforesaid southwest quarter of the northeast quarter of said section thirty-six (36) was omitted from the description of the premises as the same was recorded, the deed as so recorded describing only the west half of the southeast quarter of the northeast quarter, and northwest quarter of the southeast quarter of said section thirty-six, (36;) but it is agreed

by and between the parties to this action that the said deed and the record thereof, as aforesaid, shall have the same validity, force, and effect for every purpose of this action as though said omission had not been made in the said record, and said deed had been of that date
56 duly and properly recorded in the said office of register of deeds; that in fact said deed was afterwards, and on the 4th day of February 1857, again filed for record and recorded in said office in book Q of deeds, at page 202.

On the 10th day of March, 1852, the Commissioner of the General Land-Office cancelled the location made by the said Poncin as hereinbefore stated, and returned the land-warrant under which such location was made to the local land-office of the land-district in which the lands were situate, with the said location thereunder, made as aforesaid, cancelled and accompanied by a letter from the Commissioner of the General Land-Office, of which the following is a true copy, viz:

"GENERAL LAND-OFFICE, *March* 10, 1852.

"SIR: Herewith I return military bounty-land warrants Nos. 6873 & 50898 with the location cancelled, for the reason that the lands located therein conflict with selections made under the act of 3d March, 1849. You will therefore enter the cancellation of the locations upon the books of your office, and advise the parties in interest, as soon as practicable, of the illegality of said locations.

"I am, very respectfully, your ob't serv't,
57 "J. BUTTERFIELD,
"*Commissioner.*

"Register land-office, Stillwater, Minn. Terr."

After such cancellation of said location, and on the 20th day of January, 1853, the said Peter Poncin duly executed to me, Michael E. Ames, his power of attorney, bearing date on that day, authorizing the withdrawal from the possession of the land-officers of the United States of the land-warrant aforesaid, of which power of attorney the following is a true copy, that is to say:

"Know all men by these presents that I, Peter Poncin, of St. Anthony Falls, in the Territory of Minnesota, have made, constituted, and appointed, and by these presents do hereby make, constitute, and appoint Michael E. Ames, of Stillwater, in said Territory, my true and lawful attorney for me and my name, to ask, demand, and receive of and from the land-officers at Stillwater, in said Territory, or from the Commissioner of the General-Land Office, at the city of Washington, land-warrant No. 50898, issued to Jefferson C. Rogers and by him assigned to me, and which land-warrant was located by me on the 13th day of February, A. D. 1850, upon lands subject to sale and entry at the Stillwater land-office, in said Territory, but which location so made, with said land-warrant, has been cancelled by the Commissioner of the General Land-Office; and I hereby authorize my said attorney to take
58 and use all lawful means to obtain the same, (at his own expense,) and to receive, hold, and appropriate the same to his own use and benefit, I having this day sold and assigned all my right, title, and interest in and to said warrant unto the said Ames or his assigns, hereby ratifying and confirming all my said attorney may do in the premises.

"Witness my hand and seal the 20th day of January, A. D. 1853.
(Signed) "PETER PONCIN. [L. S.]

"In presence of—
(Signed) "C. D. GILFILLAN."

Afterwards, acting under such power, the said Michael E. Ames did withdraw said land-warrant from the possession of the officers of the said Stillwater district.

On the 30th day of October, 1853, the said Louis C. Elfelt and Charles D. Elfelt duly executed, acknowledged, and delivered to me, Isaac Van Elten, a deed of conveyance, bearing date of that day, whereby, in consideration of seventy-five dollars, to them in hand paid by the said Van Elten, they purported to remise, release, and quit-claim to the said Van Elten, and to his heirs and assigns forever, all and singular so much of said premises first herein above described as was afterwards laid out and platted into Robertson & Van Elten's addition to St. Paul, and embracing all and singular the lots and blocks
59 which are the subject of this controversy in this action, which said deed was in the usual form of quit-claim and release, and was duly recorded on the 22d day of October, 1853, in said register of deeds' office, in book E of deeds, on page 35.

By an act of Congress, approved July 27th, 1854, entitled "An act authorizing a patent to be issued to Peter Poncin for certain lands therein described," it was enacted as follows, viz:

"SEC. 1. That the entry by Peter Poncin of the north half of the southeast quarter and the south half of the northeast quarter of section thirty-six, in township number twenty-nine, of range twenty-three, in Stillwater land-district, Minnesota, cancelled by the Commissioner of the General Land-Office, be, and the same is hereby, allowed and re-instated as of the date of said entry, so that the title to said lands may inure to the benefit of his grantees as far as he may have conveyed the same; provided, that the money paid for said lands shall not have been withdrawn, or, if withdrawn, shall be again paid at said land-office, and that thereupon a patent shall issue in the name of said Peter Poncin for said lands.

"SEC. 2. *And be it further enacted*, That the superintendent of public schools in said Territory of Minnesota be, and he is hereby,
60 authorized to select other lands in lieu of said section thirty-six as far as the same have been granted or sold."

Afterwards, on the 19th day of October, 1854, the said Louis C. Elfelt and Charles D. Elfelt duly executed, acknowledged, and delivered to the said Isaac Van Etten a further deed of conveyance, bearing date of that day, whereby, in consideration of one thousand dollars, to them in hand paid by the said Van Etten, they did purport to remise, release, and quit-claim to the said Van Etten, and to his heirs and assigns forever, all and singular so much of said premises first herein above described as was afterwards laid out and platted into Robertson and Van Etten's addition to St. Paul, and embracing all and singular the lots and blocks which are the subject of controversy in this action, which said deed was in the usual form of quit-claim and release, and was duly recorded on the day of the date of said deed in book K of deeds, at page 166.

That on the 24th day of October, 1854, the said Isaac Van Etten duly executed, acknowledged, and delivered to one Daniel A. Robertson a deed of conveyance dated of that day, whereby, in consideration of one thousand dollars, to him in hand paid by the said Robertson, he did purport to remise, release, and quit-claim to the said Robertson, and
61 to his heirs and assigns forever, all and singular the equal undivided one-half part or portion of so much of the premises first herein above described as was afterwards laid out into Robertson and Van Etten's addition to St. Paul, and embracing all and singular the

lots and blocks which are the subject of controversy in this action, which said deed was in the usual form of quit-claim and release, and was duly recorded in the office of the said register of deeds on the day of [illegible] date in book I of deeds, at page 419.

That afterwards, on the 31st day of October, 1854, the said Peter Poncin paid into the said Stillwater land-office the price of said lands so by him before that time located, with said warrant as aforesaid, in money, and afterwards, on the 24th day of March, 1855, pursuant to the said special act of Congress, and in accordance with the laws, rules, and regulations in such case made and provided, the United States executed and delivered unto the said Peter Poncin a patent for the said lands, which said patent was so issued in the name of the said Peter Poncin, and was in the words and figures following, viz:

"*Certificate No.* 2200 *A.*

"The United States of America to all to whom these presents shall come, greeting:

62 "Whereas Peter Poncin, of Ramsey County, Territory of Minnesota, has deposited in the General Land-Office of the United States a certificate of the register of the land-office at Stillwater, whereby it appears that full payment has been made by the said Peter Poncin according to the provisions of the 24th of April, 1820, entitled 'An act making further provisions for the sale of the public lands,' and also of the act of Congress approved 27th of July, 1854, entitled 'An act to authorize a patent to be issued to Peter Poncin for certain lands therein described' for the north half of the southeast and the south half of the northeast quarter of section thirty-six, (36,) in township twenty-nine (29) north, of range twenty-three (23) west, in the district of lands subject to sale at Stillwater, Minnesota Territory, containing one hundred and sixty (160) acres, according to the official plat of the survey of the said lands returned to the General Land-Office by the surveyor-general, which said tract has been purchased by the said Peter Poncin.

"Now, know ye that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Peter Poncin, and to his heirs, the said tract above described, to have and to hold the same,

63 together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said Peter Poncin, and to his heirs and assigns forever.

"In testimony whereof I, Franklin Pierce, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land-Office to be hereunto affixed. Given under my hand at the city of Washington, the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and fifty-five, and of the Independence of the United States the seventy-ninth.

"By the President:

[SEAL.] "FRANKLIN PIERCE,

"By E. H. BALDWIN, *Ass't Sec'y.*

"J. N. GRANGER,

"*Recorder of the General Land-Office.*"

That afterwards, on the 2d day of July, 1855, the said Robertson and Van Etten duly platted into lots and blocks, as an addition to the city of St. Paul, a certain tract of the premises first herein above described,

containing about thirty acres of land, and embracing all and singular the lots and blocks which are the subject of controversy in this action, under the name of "Robertson and Van Etten's addition to Saint Paul," and which said plat was duly recorded in the office of the register of deeds for said county of Ramsey, on the same day, in book
64 C of town plats, on page 2.

That on the 14th day of January, 1856, the said Alpheus R. French made, executed, acknowledged, and delivered to one P. P. Furber a deed of conveyance, whereby, in consideration of one hundred dollars, to him paid by said Furber, he did purport to remise, release, and quit-claim to the said P. P. Furber, and to his heirs and assigns forever, the southwest quarter of the northeast quarter, and the west half of the southeast quarter of the northeast quarter of said section thirty-six, being a portion of the premises first herein above described, and embracing the lots and blocks which are the subject of controversy in this action, which said deed was in the usual form of quit-claim and release, and was duly recorded in the office of the register of deeds aforesaid, on the day of its date, in book M of deeds, at page 942.

That on the 28th day of June, 1856, the said P. P. Furber made, executed, acknowledged, and delivered to one John P. Dunn a deed of conveyance, dated on that day, whereby, in consideration of one hunhundred and fifty dollars, to him paid by said Dunn, he did purport to remise, release, and quit-claim to the said Dunn, and to his heirs and assigns forever, the premises first herein above described, which said deed was in the usual form of quit-claim and release, and was
65 duly recorded in the office of the register of deeds for said county of Ramsey, on the 1st day of July, 1856, in book N of deeds, at page 664. That afterwards and on the 31st day of July, 1856, the said John P. Dunn and wife made, executed, acknowledged, and delivered to one Abram A. Hammond a certain deed of conveyance in the words and figures following, viz:

"Know all men by these presents that John P. Dunn and Margaret E. Dunn, his wife, of the city of Indianapolis, county of Marion, and State of Indiana, in consideration of the sum of one hundred and fifty dollars now in hand paid by Abram A. Hammond, of the city of Terre Haute, county of Vigo, and State of Indiana, the receipt whereof is hereby acknowledged, have bargained, sold, and quit-claimed, and by these presents do bargain, sell, and quit-claim unto the said Abram A. Hammond, his heirs and assigns forever, all our right, title, interest, claim, and demand in and to the following-described piece or parcel of land situate and being in the county of Ramsey, and Territory of Minnesoto, described as follows, viz: The southwest quarter of the northeast quarter, and the west half of the southeast quarter of the northeast quarter of section number thirty-six, in township number twenty-
66 nine north, of range number twenty-three west of the fourth principal meridian, containing sixty acres, more or less, to have and to hold the above quit-claimed premises, with all privileges and appurtenances thereto belonging to the Abram A. Hammond, his heirs and assigns forever, so that neither we, the said John P. Dunn and Margaret E. Dunn, our heirs or assigns, or any person claiming by, from, or under us, shall have any right, title, interest, or demand in or to the aforesaid premises, and said land the grantors forever warrant and defend against all claims under them.

"In witness whereof we have hereunto set our hands and seals, this 31st day of July, A. D. 1856.

"JOHN P. DUNN. [SEAL.]
"MARGARET E. DUNN. [SEAL.]

"As to J. P. Dunn, signed, sealed, and delivered in the presence of—

"J. W. WRIGHT.
"W'M SULLIVAN.
"As to both: his
"MARCY + MCMULLEN.
mark.

"STATE OF INDIANA, *Marion County, sct:*

"On the 31st day of July, A. D. 1856, came before me John P.
67 Dunn and Margaret E. Dunn, the persons who executed the said deed, and they acknowledged the execution of the foregoing deed; and the said Margaret E. Dunn, being by me examined separately apart from her said husband, acknowledged that she executed said deed freely and without any fear or compulsion from any one.

"In witness whereof I have hereunto set my hand and seal, at the city of Indianopolis, this 31st day of July, A. D. 1856.

"W'M SULLIVAN, *J. P.* [SEAL.]

"STATE OF INDIANA, *Marion County, ss:*

"I, William Stewart, clerk of the circuit court within and for the county of Marion aforesaid, do hereby certify that William Sullivan, eqrs., whose certificate of acknowledgment appears to the instrument of writing to which this is attached, was on the date and at the time of making said certificate, to wit, the 31st day of July, 1856, an acting justice of the peace within and for said county of Marion, duly elected, commissioned, and qualified, and that full faith and credit ought to be given to his official acts, and that the signature purporting to be his is genuine.

"In witness of which I hereunto affix the seal of said court and
68 subscribe my name at Indianapolis, this 31st day of July, A. D. 1856.

{ MARION CO. SEAL, INDIANA. }

"W'M STEWART, *Clerk*,
"By JOHN COHEN, *Dep.*"

And afterwards, on the 20th day of September, 1862, the said Hammond and wife made, executed, and delivered to the complainant a certain deed of conveyance in the words and figures following, to wit:

"This indenture witnesseth, that Abram A. Hammond and Mary B., his wife, of Marion County, in the State of Indiana, quit-claim, sell, alien, and convey to William M. McCarty, his heirs and assigns forever, for the sum of five hundred dollars, the following real estate in Ramsey County, State of Minnesota, to wit, the northwest quarter of the southeast quarter, and the southwest quarter of the northeast quarter, and the west half of the southeast quarter of the northeast quarter, all in section thirty-six, (36,) in township twenty-nine (29) north, of range twenty-three (23) west, of the fourth principal meridian, containing one hundred (100) acres, more or less.

"In witness whereof the said Abram A. Hammond and Mary
69 B. Hammond, his wife, have hereto set their hands and seals, this 20th day of September, 1862.

"ABRAM A. HAMMOND. [SEAL.]
"MARY B. HAMMOND. [SEAL.]

"STATE OF INDIANA,
Marion County, sct:

"Before me, Henry J. Lindley, a notary public in and for said county, this 20th day of September, 1862, Abram A. Hammond and Mary B. Hammond his wife, and the said Mary B. Hammond being by me examined separate and apart from her said husband, and the full contents of said deed being made known to her, she did upon said examination declare that she executed and delivered said deed of her own free will, and without any compulsion from her said husband.

"Witness my hand and notarial seal.

[NOTARIAL SEAL.] "HENRY J. LINDLEY,
"*Notary Public.*"

That said last-named two deeds were both executed in the State of Indiana, and that neither of them have ever been recorded in the office of the register of deeds for said Ramsey County or elsewhere.

That on the 30th day of January, 1858, the said Robertson and Van Etten commenced an action in the district court for the second
70 judicial district, and county of Ramsey, in this State, against the said John P. Dunn and P. P. Furber, and filed in his complaint in said action with the clerk of that court on that day, and a summons thereupon duly issued in said action, and was duly served on the said defendants, John P. Dunn and P. P. Furber, on the former by the publication thereof, in accordance with the statutes in such case made and provided, in which said complaint the plaintiffs therein claimed to be in the possession of so much of the premises first herein above described as is covered by said Robertson & Van Etten addition to Saint Paul; and, among other things, demanded judgment that the title to said premises so embraced in said addition be adjudged to belong to and to be quieted in the said plaintiffs; that such proceedings were afterwards had in the said action; that a judgment was duly entered therein on the 25th day of August, 1858, in favor of the plaintiffs therein, and against the defendants therein, the said Furber and the said Dunn, whereby it was among other things adjudged and decreed by the said court, that the said Isaac Van Etten and Daniel A. Robertson, were the owners in fee-simple of all and singular the said premises so covered by the said Rob-
ertson and Van Etten' addition to Saint Paul, and entitled
71 to and in possession thereof; that the said deed from said French to said Furber, bearing date June 14, 1856, and purporting to convey said southwest quarter of the northeast quarter, and the west half of the southeast quarter of the southeast quarter of said section thirty-six, was null and void and of no effect, so far as the same relates to and includes the said addition to Saint Paul; and that the said deed from the said Furber to the said Dunn, bearing date June 28, 1858, purporting to convey the premises last above described, was also null and void and of no effect, so far as the same relates to and includes said addition, and that the said judgment be recorded in said register of deeds' office, and that the title to so much of said premises as embraces said Robertson and Van Etten's addition to Saint Paul vest in the said Robertson and Van Etten, the plaintiffs in said action, without any further act or deed on their part or the part of the defendants in said action, which said judgment was afterwards, on the 26th day of August, 1858, duly recorded in said register of deeds' office, in book A of miscellaneous, on page 60.

That afterwards, by sundry deeds of conveyance duly executed, acknowledged, and delivered by the said Isaac Van Etten and Daniel

72 A. Robertson, and from those claiming by, through, and under them, and all duly recorded in the office of the said register of deeds, all the right, title, and estate which the said Isaac Van Etten and Daniel A. Robertson, or either of them, acquires under and by virtue of the deeds and instruments in writing, and the judgment and proceedings in the aforesaid action, and of the facts and matters aforesaid, in and to the lots and blocks which are the subject of controversy in this action, has been duly acquired by and vested in these defendants, all of which said deeds and conveyances were executed for valuable considerations, and in good faith, without any notice of the deeds from the said John P. Dunn to the said Abram A. Hammond, or either of them, in the complainant's bill set forth, and without any notice of the deed from the said Hammond and wife to the complainant, also in said bill of complaint set out, except such notice, if any, as the law would presume from the existence of the foregoing facts.

In addition to the foregoing, the following statement of facts are admitted to be true, but the complainant objects to the same on the ground
73 that the same are irrelevant and immaterial, and the same are to be considered as in evidence, provided said objection is not well founded. If said objection is well founded then said statement is to be excluded, viz:

That said 100-acre tract has all been platted and laid out into additions to the city of Saint Paul by parties claiming title under the said deed from French to the said Elfelts, and that said premises have become of the value of at least two hundred and fifty thousand dollars; that a number of the lots so laid out and platted in said additions have been improved and are held by actual occupants residing thereon, holding the same under the said Elfelt title, the number of residences being about thirty in number; that no portion of said premises has ever been actually occupied by any one claiming under the complainant's said title from the said French; that no one claiming under the complainant's title has ever paid any taxes on said premises, or has ever demanded possession thereof of any one so holding and occupying, prior to the commencement of this action; that the complainant and those under whom he claims title have been cognizant of the improvements so made upon the said premises, and have made no objection thereto, and have given no
74 notice of his claim beyond what appears by the record of the deeds under which he claims as aforesaid.

J. M. GILMAN,
W. P. CLOUGH,
Comp't Sol'rs.
GEO. L. OTIS,
Sol'r for Def'ts.

JUNE 23, 1873.

And afterwards, to wit, on the twenty-seventh day of June, A. D. 1873, at the general June term of said court, held at St. Paul, in said district, the following proceedings among others was had, viz:

WILLIAM M. MCCARTY
vs.
CHARLES A. MANN ET AL.

This cause came on to be heard, and was argued by counsel, W. P. Clough, esq., for plaintiff, and Geo. L. Otis, esq., for defendants, and submitted to the court, and by the court held under advisement.

And afterwards, to wit, on the twenty-eighth day of June, A. D. 1873, at the general June term of said court, held at St. Paul, in said district, the Hon. John F. Dillon and the Hon. Rensselaer R. Nelson, judges, being present, the court announced and delivered its opinion in said cause, which opinion was in writing, and in the words and figures following, viz:

75 United States circuit court, district of Minnesota, June term, 1873

McCarty
v.
Mann et al.

This is a bill in equity to quiet title, and involves the validity and construction of an act of Congress approved July 27, 1854. (10 Stat's at Large, 798.) This act is as follows: "Be it enacted, &c., that the entry by Peter Poncin, of the N. ½ of the S. E. ¼, &c., sec. 36, &c., cancelled by the Commissioner of the General Land-Office, be, and the same is hereby, allowed, and re-instated as of the date of the said entry, so that the title to the said lands may enure to the benefit of his grantees as far as he may have conveyed the same." Then follows a proviso that Poncin shall make payment therefor at the land-office, and "thereupon a patent shall issue in the name of the said Peter Poncin for said lands."

On the 13th February, 1850, Peter Poncin located a land-warrant on the land described in the act. On March 28, 1850, he conveyed the same by warranty for the consideration of $150 to one Pepin; and Pepin, on March 29, 1850, conveyed by warranty to French, and French, in consideration of $500, on March 29, 1851, conveyed by quit-claim to El-

76 felts. On the 10th day of March, 1852, the Commissioner of the General Land-Office cancelled the location of Poncin. On the 13th day of October, 1853, Elfelts conveyed to Van Etten. The title thus stood in Van Etten at the date of the aforementioned act of July 27, 1854 On the 31st day of October, 1854, Poncin paid for the land at the land-office, and on the 24th day of March, 1855, he received a patent under and reciting the said act of July 27, 1854.

The defendants claim under the said deed of March 19, 1851, from French to Elfelts. After the patent to Poncin was issued, viz, on the 14th day of January, 1856, French made another deed by quit-claim to one Furber, and it is under this deed that the plaintiff claims title. Neither party is in possession. The land was laid out in July, 1855, as "Robertson and Van Etten' addition to St. Paul," and is now of great value.

W. H. McCarty, & Gilman, Clough & Wilde, for the plaintiff.
Geo. L. Otis for the defendants.

Dillon, *Circuit Judge:*

77 The location of Poncin was cancelled by the Commissioner because it was made on land which had been duly reserved from sale as school-lands, and the Government, by the second section of the act of July 27, 1854, granted to the Territory of Minnesota for school purposes other lands in the place of them, which by that act it authorized to be patented to Poncin.

The act of July 27, 1854, validated, on condition of payment, the entry of Poncin which had had been cancelled, and declared that the said

entry should be "allowed and re-instated as of the date of the said entry," which was February 12, 1850. The act declared one purpose for which this was done to be "that the title to the said lands should enure to the benefit of the grantees of Poncin as far as he may have conveyed the same." The condition of payment to the Government was subsequently complied with.

It is, in our opinion, too plain to admit of fair controversy that Congress had the power to re-instate this entry, and to declare the terms on which it would do so. It was the land of the General Government and under the absolute disposal of Congrecs. It saw fit to dispose of it for the benefit of Poncin and his grantees, one of whom was Van Etten.

French having before that time conveyed to Elfelts, the grantors
78 of Van Etten had no longer any interest in the land, and could derive no benefit from the act. In 1856, when he made the quit-claim to Furber, under which the plaintiff claims, he had no interest in the land and consequently conveyed none.

We are unable to see any ground on which the plaintiff can rest. He claims under a deed made long after the act of 1854; neither he nor French, under whom he claims, had any interest in the land when that act was passed; he insists that the land was solely that of the Government, and how he can question the right of the sovereign to dispose of its land as it may see fit and its action in recognizing equities in the grantees of Poncin, we confess we have been unable to discover.

His counsel's argument rests upon the assumption that Poncin became the absolute owner in his own right by the patent in 1855; that no precedent equities existed, or could by Congress be recognized to exist; and that the title under the act enured only to the grantees of Poncin, who held by deeds of warranty. Such a construction would defeat the manifest intention of the act.

By the construction for which the plaintiff contends the act was passed for or enured to the benefit of French, although he had on
79 the 19th day of April, 1850, made bond for a deed to Elfelts which was recorded, and although he had on March 19, 1851, for a valuable consideration, conveyed by a deed which was also on record, all his interest in said lands to Elfelts.

It is utterly inconceivable that Congress intended the act for the benefit of French. It was intended for the benefit of the owners under Poncin, and the owner at the time of its passage was Van Etten, the grantee of Elfelts.

The bill must be dismissed.

NELSON, *J.*, concurs.

Bill dismissed.

80 And afterwards, to wit, on the same day at said June term of said court, A. D. 1873, the following proceeding among others was had, viz:

81 *Decree.*

United States circuit court, district of Minnesota. In equity.

WILLIAM M. MCCARTY, COMPLAINANT, *vs.* CHARLES A. MANN AND EBEN MAYALL, DEFENDANTS. } General term, June, 1873.

This cause came on to be heard at this term, and was argued by coun-

sel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed that the complainant's bill of complaint be, and the same is hereby, dismissed, and that the defendants recover and from the plaintiff their costs by them in and about their suit in this behalf expended, to be taxed, and that the defendants have execution therefor.

And the plaintiff, by his solicitor, moving therefor, ordered, that an appeal be allowed the plaintiff from this decree to the Supreme Court of the United States.

82 And afterwards, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and seventy-three, came the said plaintiff by his said solicitor, and filed in the clerk's office of said court his bond on appeal, duly approved by the Hon. Rensselaer R. Nelson, one of the judges of said court, which said bond and approval are in writing, and in the words and figures following, viz:

83 In the Supreme Court of the United States.

WILLIAM M. McCARTY
vs.
CHARLES A. MANN AND EBEN MAYALL.

Know all men by these presents that we, William P. McCarty, as principal, and John M. Gilman and William P. Clough, as sureties, are held and firmly bound unto the said Charles A. Mann and Eben Mayall in the sum of five hundred dollars, to be paid to the said Charles A. Mann and Eben Mayall, their executors and administrators. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators firmly by these presents; sealed with our seals; dated this 1st day of July, 1873.

Whereas the above-named William M. McCarty hath taken an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States in and for the district of Minnesota:

Now, therefore, the condition of this obligation is such that if the above-named William M. McCarty shall prosecute his said appeal with effect, and answer all costs if he shall make good his plea,
84 then this obligation shall be void; otherwise to remain in full force and virtue.

Sealed and delivered in presence of—

W. M. McCARTY. [SEAL.]
JOHN M. GILMAN. [SEAL.]
WILLIAM P. CLOUGH. [SEAL.]

DISTRICT OF MINNESOTA, *ss:*

John M. Gilman and William P. Clough, being duly sworn, say, each for himself, that he is worth the sum of five hundred dollars above debts, liabilities, and property, exempt from levy and sale under execution, and that he is a resident and freeholder in said district, and is one of the sureties in the foregoing bond.

JOHN M. GILMAN.
WILLIAM P. CLOUGH.

Subscribed & sworn to before me this 1st day of July, 1873.
H. E. MANN, *Clerk.*

I hereby approve the foregoing bond, and the sureties thereon.
Dated July 1, 1873.
R. R. NELSON, *Judge.*

And afterwards, to wit, on the third day of July, A. D. 1873, came the said plaintiff by his said solicitors, and filed his written appeal in the clerk's office of said court, which appeal with proof of service thereof, thereon indorsed, are in the words and figures following, viz:

85 In the Supreme Court of the United States.

WILLIAM M. MCCARTY, APP'L,
vs.
CHARLES A. MANN AND EBEN MAYALL, RESP'D'TS.

To the honorable the Supreme Court of the United States:

The appeal of William M. McCarty, complainant and appellant above named, respectfully showeth:

That upon the 2d day of October, 1872, this appellant filed his bill in the circuit court of the United States for the district of Minnesota, wherein and whereby it was alleged, among other things, that this appellant was a citizen of the State of Alabama, and the respondents were citizens of the State of Minnesota; that this appellant was then owner, in fee-simple, of certain parcels of real estate in said district situated, which were in said bill particularly described; that the same then were of a greater value than two thousand dollars, and were vacant and unoccupied lands; that the respondents then claimed some estate or interest in the whole of the same, adverse to this appellant; and praying, among other things, that the respondents might be decreed to have no right, title, interest, or claim in any of said parcels of land, and
86 that this appellant might be decreed to be the lawful owner of all the same, free and clear of any claim or title thereto on the part of the respondents, or either of them.

And this appellant further showeth that afterwards the said respondents filed in said circuit court of the United States their joint and several answer to this appellant's said bill, wherein and whereby it was admitted, among other things, that the said parcels of land were vacant and unoccupied lands, and that the same were of a greater value than the sum of two thousand dollars, but wherein and whereby it was denied that this appellant had any right, title, interest, or claim whatsoever in or to any part of said lands, and averred that they, the said respondents, were the owners, in fee-simple, of said parcels of land, and of each of them; and wherein and whereby it was prayed, among other things, that this appellant's said bill be dismissed.

And the appellant further showeth that afterwards this appellant filed in said circuit court his general replication, in the usual form, to the respondent's answer.

And the appellant further showeth that on the 28th day of June, 1873, a final decree was made and pronounced in the cause, wherein it was, in substance, decreed that this appellant's said bill stand dismissed out of said circuit court.

87 Wherefore this appellant appeals from the whole of said decree of said circuit court of the United States, and respectfully prays

that the decree of the said circuit court and the bill, answer, pleadings, depositions, evidence, stipulations, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made granting the relief in this appellant's said bill prayed.

Dated July 1, 1873.

J. M. GILMAN AND
WILLIAM P. CLOUGH,
Sol. & Coun. for appellants.

(Endorsed:) Supreme Court U. S. W'm M. McCarty, app., vs. C. A. Mann et al., resp. Appeal.

Due service of within, by copy, at St. Paul, Minnesota, on this 3 day of July, 1873, is hereby admitted.

GEO. L. OTIS,
Sol'r & Couns. for Resp's.

Filed July 3, 1873. H. E. Mann, clerk. J. M. Gilman & William P. Clough, sol'rs & coun. for app'l.

88 By the honorable R. R. Nelson, one of the judges of the circuit court of the United States for the district of Minnesota:

To Charles A. Mann and Eben Mayall:

Whereas William M. McCarty has lately appealed to the Supreme Court of the United States, from a decree lately rendered in the circuit court of the United States for the district of Minnesota, made in favor of you, the said Charles A. Mann and Eben Mayall, and has filed the security required by law:

You are therefore hereby cited to appear before the said Supreme Court at the city of Washington, on the second Monday of October next, to do and receive what may appertain to justice in the premises.

Given under my hand this 1st day of July, A. D. 1873.

R. R. NELSON,
U. S. Judge.

89 (Indorsed:) Supreme Court U. S. W'm M. McCarty vs. C. A. Mann et al. Citation.

Due service of within, by copy, at St. Paul, Minnesota, is hereby admitted this 3d day of July, 1873.

GEO. D. OTIS,
Sol. & Com. for Resp.

Filed July 3, 1873. H. E. Mann, clerk. J. M. Gilman & William P. Clough, sol's & coun's for app.

90 UNITED STATES OF AMERICA:

Circuit court of the United States for the district of Minnesota, *ss:*

I, H. E. Mann, clerk of said court, do hereby certify and return to the honorable the justices of the Supreme Court of the United States, that the foregoing is a true and complete transcript of the records, process,

pleadings, orders, final decree, and all other proceedings in said cause, and also of all the depositions, exhibits, and proofs taken therein; all the opinions of the court therein, and stipulations of the parties, as appears from the original records and files of said court. And I do further certify and return that I have annexed to said transcript, and do hereby transmit therewith, the original citation of appeal, together with the proof of the service thereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Saint Paul, in said district, this eleventh day of September, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

[SEAL.] H. E. MANN,
Clerk of the United States Circuit Court
for the District of Minnesota.

Fees, $35.25.

(Indorsement on cover:) No. 542. William M. McCarty, appellant, vs. Charles A. Mann and Eben Mayall. Minnesota C. C. U. S. Filed 14th October, 1873.

IN THE SUPREME COURT OF THE UNITED STATES.

1873 TERM.

No. 542.

WILLIAM M. McCARTY, APPELLANT.

vs.

CHARLES A. MANN AND EBEN MAYALL, RESPONDENTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

APPELLANT'S BRIEF.

W. P. CLOUGH,

Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

1873 TERM.

WILLIAM MCCARTY, *Appellant*,
vs.
CARLES A. MANN, and EBEN MAYALL, *Respondents*.

APPEAL FROM A DECREE OF THE CIRCUIT COURT OF THE U. S. FOR THE DISTRICT OF MINNESOTA, SITTING IN EQUITY.

STATEMENT OF THE CASE.

This case was a bill in equity exhibited by McCarty against Mann and Mayall, under provision of *Sec.* 1, *chap.* 72, *Gen. L. of Minn.*, 1867, which empowers any person having or claiming title to vacant or unoccupied real estate to bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively.

The question involved in the suit is, In whom is the title to certain lots described in the bill.

The facts bearing upon the case were ~~were~~ embodied in a stipulation, upon which and the pleadings the case was heard.

The important facts in the case, as agreed upon by the parties, are briefly these :

On March 3, 1849, an act of Congress was passed entitled "*Act act to establish the territorial government of Minnesota.*" 9 *U. S. Stats at Large*, *p.* 403.

This act created and organized the territory named in its title.

SEC. 18 of that act reads as follows:

"SEC. 18. *And be it further enacted*, That when the lands in the said territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty six in each township in said territory shall be, and the same are hereby, reserved, for the purpose of being applied to schools in said territory, and in the state and territories hereafter to be created out of the same."

At the time of the passage of this Act, the United States owned, as parcel of the public lands, the following described tract, now included within the boundaries of the city of St. Paul, to wit:

The S. ½ of the N. E. ¼, and the N½ of the S. E. ¼ of Sec. 36, town 29, north, range 23, west, containing 160 acres, which was reserved by the provisions of said section of said Organic Act, for the purposes therein expressed. (Record, p. 17.)

On Jan. 12, 1850, one Peter Poncin, the owner of a U. S. military land warrant entitling the owner thereof to 160 acres of the public lands of the United States not otherwise appropriated or set apart, applied at the United States land office for the Stillwater, Minn., land district, wherein said tract lay, to locate such warrant upon the same. Such location was thereupon allowed by the officers in charge of such office, notwithstanding the said provision of said Organic Act, and a certificate thereof, in the usual form, bearing date on that day, was issued, under the hand of such officers, to Poncin. (Record, p. 17.)

On March 28, 1850, Poncin, in consideration of $150 paid in hand by one Antoine Pepin, executed a deed of conveyance to him, in due form of law, purporting to convey in fee 100 acres of said tract, therein particularly described. (Record, p. 17.)

On March 29, 1850, in consideration of $100, paid by Alpheus R. French, Pepin executed a deed of conveyance

to him, in due form of law, purporting to convey in fee the same 100 acres. Record, p. 17.

Each of these deeds contained a covenant of warranty in usual form. (Record, p. 17.)

On March 10, 1852, the Commissioner of the United States General Land Office cancelled the said location of Poncin, on the ground that the same was in conflict with the said Organic Act, reserving said tract, and on that day returned said land warrant to the local land office with such location cancelled, accompanied by a letter directing such cancellation to be entered in the books of the local land office, and that the parties interested be notified of the illegality of the location, and of such cancellation. (Record, p. 20.)

On Jan. 20, 1853, Poncin sold said land warrant, then still at the land office, to one Michael E. Ames, and executed a written power of attorney to him, authorizing him to withdraw the same from the land office; in which power it was recited that the same had been located upon public lands, and that such location had been cancelled. By virtue of such sale and power, Ames afterward withdrew said warrant from the land office. (Record, pp. 20, 21.)

On July 27, 1854, an Act of Congress was passed, entitled, "*An act authorizing a patent to be issued to Peter Poncin for certain lands therein described.*" 10 *U. S. at Large, p.* 798. (Record, p. 21.)

This act provides as follows:

"That the entry of Peter Poncin, of the north half of the south-east quarter, and the south half of the north-east quarter of section thirty-six, in town 29, of range 23, in the Stillwater Land District, Minnesota, cancelled by the Commissioner of the General Land Office, be, and the same is hereby, allowed and reinstated as of the date of said entry, so that the title to said lands may enure to the benefit of his grantees, as far as he may have conveyed the same; *provided*, That the money paid for said land shall not have been withdrawn, or if withdrawn, shall be again paid at said land office, and that thereupon a patent shall issue in the name of said Peter Poncin for said lands." (Record, p. 21.)

After the passage of this act, and on October 31, 1854, Poncin paid into the local land office the sum of $200 in money, as the price of said tract, and thereupon received a certificate of entry of the same; and on March 24, 1855, a patent was issued by the United States, in usual form, to him, granting and conveying said tract. (Record, p. 22.)

The appellant claims to be owner in fee of said 100 acres, and derives title from French, as follows:

After the issuance of the patent to Poncin, and on January 24, 1856, French executed to one Pierre P. Furber, a deed of conveyance in fee of the same; on June 28, 1856, Furber executed to one John P. Dunn, a deed of conveyance in fee of the same; on July 31, 1856, Dunn executed to one Abram H. Hammond, two deeds of conveyance in fee of the same, each covering separate portions thereof; and on September 20, 1862, Hammond executed to McCarty a deed of conveyance in fee of the same. (Record, pp. 23, 24, 25.)

The respondents claim, on the other hand, to be owners in fee of certain parts of said 100 acres, in the Bill particularly described, and also claim title under French.

Whatever rights they have, are derived thus:

On April 19, 1850, French executed to Louis C. and Charles D. Elfelt, a bond or contract, whereby, in consideration of $500 to be paid to him in personal property, he agreed to convey to them said 100 acres; and afterwards, and on March 14, 1851, the Elfelts in the meantime having paid the price, French, to satisfy and carry out the bond or contract, executed and delivered to them a deed of release and quit-claim, without covenants, of the same. (Record, pp. 7, 8, 18, 19.)

On October 13, 1853, and on October 19, 1854, the Elfelts made deeds of a part of said 100 acres, about 30 acres in quantity, to one Isaac Van Etten; and on March 24, 1854; and on October 24, 1854, Van Etten made deeds of an undivided half interest in said 30 acres to one D. A. Robertson. (Record, pp. 21, 22.)

On July 2, 1855, Robertson and Van Etten platted said

30 acres into lots and blocks, as an addition to the city of St. Paul. (Record, p. 21.)

On January 30, 1858, Robertson & Van Etten, by virtue of a statute of the Territory of Minnesota similar in substance to that under which this bill was exhibited, commenced an action in a court of said Territory having jurisdiction of the subject matter, to have said deeds under which the appellant claims, from French to Furber, and from Furber to Dunn, declared void as to said 30 acres, and to have the title to the same adjudged to be in them.

The defendants in that action were Furber and Dunn. Hammond was not made a party, probably from the fact that the deed to him from Dunn covering the 30 acres, had not been recorded.

On August 25, 1858, a judgment was rendered in that action granting the relief sought by the plaintiffs therein. (Record, p. 25.) At the time of the execution of the deeds from Dunn to Hammond, the following statute was in force in the territory named.

"Every conveyance of real estate within this territory hereafter made, which shall not be recorded as provided by law, shall be void, as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first recorded." *Comp. Stats. of Minn., p.* 400, *sec.* 24.

This comprised the sole statutory provision in Minnesota upon the subject of failure to record deeds of real estate, until Aug. 3, 1858, when the following statute was passed:

"Every conveyance by deed, mortgage or otherwise, of real estate in this state, hereafter made, shall be recorded in the office of the register of deeds of the county where such real estate is situated; and every such conveyance not so recorded shall be void, as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, whose conveyance shall be first duly recorded, or as against any attachment levied thereon, or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record, prior to the recording of such conveyance." *Comp. Stats. of Minn., p.* 404, *sec.* 1.

After the rendition of said judgment quieting title, and before the filing of this bill, Robertson and Van Etten made deeds to the Respondents of certain lots in their said addition. (Record, pp. 25, 26.)

All the deeds and instruments under which the parties respectively claim, were duly recorded at or about the time of the execution thereof, except the deed from Dunn to Hammond, and the deed from Hammond to the Appellant.

It is not claimed that any person was ever in possession of any part of said 100 acres prior to the passage of the act of Congress of 1854.

The Circuit Court upon the hearing decided that the Appellant has no title to the lots in controversy; but that the title to the same is in the Respondents; and accordingly dismissed the bill. (Record, pp. 28, 29.)

To reverse that decree, this appeal was taken.

ASSIGNMENT OF ERRORS.

The Appellant insists that the decree appealed from is erroneous in this: That the same dismisses his bill, whereas the same should have adjudged him to be the owner in fee of the premises in controversy, and that the Respondents have no title to, nor interest in, such premises.

BRIEF OF ARGUMENT.

I.

THE ATTEMPTED LOCATION BY PONCIN OF THE LAND WARRANT IN JANUARY, 1850, WAS NULL AND VOID, AND CONFERRED UPON HIM NO SPARK OF TITLE OR INTEREST.

The several officers of the United States, intrusted with the disposition of its public lands, are its mere *agents*, invested with such power, only, as the principal actually delegates to them. Such officers, moreover, do not enjoy that discretion and authority which belong to that class of agents known in the law as *general* agents; but have only that

narrow and limited authority which pertains to the class designated as *special* agents. They can only transact such business of the principal as the latter gives them specific power to transact, and they can only do it by the modes and in the forms which the principal prescribes.

In delegating power to these agents, the United States acts through its legislative department. The power must be conferred by Act of Congress, and cannot be conferred in any other mode. It follows, therefore, that land officers must find all their authority to act for, and to bind, their principal in some Congressional Act, and not elsewhere. Whatever act any of these assumes to do, which is not directly and explicitly permitted by some statute of the United States, is necessarily *ultra vires* and void, on the familiar ground that an agent acting beyond the scope of his authority does not bind his principal.

Furthermore, all who deal with these agents are bound to know as a matter of law, the precise scope and extent of their authority. This results from the fact that all who deal with them know them to be mere agents acting in no degree for themselves, but entirely for another, and from the further fact that their whole authority is embodied in the public statutes of the Union, the contents of which all are bound to know.

If, therefore, the act of Poncin in offering to locate his land warrant upon the tract of land in dispute, and the act of the land officers in allowing such location, and in issuing their certificate therefor had any effect to bind the government, and to pass the ownership of, or any other interest in, the tract, from it to Poncin, it resulted wholly from the existence of some law of Congress permitting such disposition of the lands to be made. But if, on the other hand, no such permissive law was in force, the acts of Poncin and of the officers went for nothing, and the title to the lands was wholly unaffected thereby.

To show merely an absence of all statutory authority for the disposition of the lands, would be to show that no spark

of interest had been drawn from the government. But this is a case of more than the mere non-existence of authority. It is a case of absolute prohibition upon the agents of the Union, from making any disposition of the lands to any person, by any mode, or for any purpose. *Sec.* 18 of the act of 1849, before quoted, in reserving the tract in question for a particular use, thereby, in terms, prohibited all attempts on the part of any person to divert them to any other use.

The attempted location of Poncin, was ineffectual for any purpose whatever; for the reason that it was not only unauthorized by law, but was in direct violation of law.

Wilcox vs. Jackson, 13 *Peters*, 498, *Stoddard vs. Chambers*, 2 *How.*, 284.

II.

NEITHER PONCIN NOR ANY PERSON CLAIMING UNDER HIM ACQUIRED ANY INTEREST WHATEVER IN THE LANDS UNTIL PONCIN'S ENTRY OF THEM UNDER PROVISION OF THE ACT OF 1854.

Since Poncin by his location of his land warrant acquired no rights whatever, his deed of conveyance carried none with it. The same is true of all deeds of the lands made prior to their entry under the special act. True, the covenants, in such of the deeds as contained them, created personal obligations binding upon those who entered into them, and which attached to and operated upon, the title to the lands at the instant of their passage from the United States. But no act which the parties did, affected, or could affect the lands themselves prior to their lawful entry.

At the date, therefore, of the passage of the special act, the United States continued to retain as full, complete, absolute, and perfect ownership of the lands as it had ever enjoyed. There was not at that time even any mode in existence whereby private persons could obtain any description of interest in them.

Nor was any manner of interest conferred upon Poncin, or upon any claiming under him by mere operation of the special act itself. That act was a bare offer to Poncin, to

sell the lands to him for a certain price. He could not have located his land warrant upon them after its passage with any greater effect than he did in 1850. But if the act had permitted it, the warrant had been sold by him, and upon such sale had been withdrawn from custody of the officials, more than a year before. The sole difference, in effect, between this special act and the general laws of the Union then in force for disposal of its lands at private entry, was that the former was an offer to sell made to a single individual, while the latter were offers to sell made to any who might see fit to buy. Under either rule, an interest would first pass when the offer made had been unconditionally accepted, and its terms complied with.

The Yosemite Valley Case, 15 *Wallace*, 77; *Frisbie vs. Whitney*, 9 *Wallace*, 187.

Until Poncin had accepted the offer thus made to him, by entry of the lands, and by payment for them according to the terms of the offer, the title of the government still remained wholly intact, and the offer might have been at any time withdrawn. True, the language of the act is, that the "Entry * * * is hereby reinstated." but there follows immediately a proviso which prevented any interest whatever, from passing, until the purchase money should be first paid.

III.

UPON THE ENTRY OF THE LANDS BY PONCIN, UNDER THE SPECIAL ACT, THE TITLE IMMEDIATELY PASSED FROM HIM TO PEPIN, AND FROM PEPIN TO FRENCH; AND REMAINED IN THE LATTER UNTIL CONVEYED TO FURBER IN 1856.

At the time of the entry by Poncin, under the Act of 1854, the relations of the parties to the lands, and to each other with respect thereto, were these:

1st. None of them had any interest whatever in the lands, for reasons before stated.

2nd. The assignee of the warrant, Ames, was sole propri-

etor of that document. Government had not satisfied it by transfer to its owner of the quantity of lands to which it entitled him, and had surrendered it to such owner as an instrument yet in full force. None of the persons to whom deeds had been made acquired any interest in the warrant, for no attempt had been made to transfer any such interest by any of the deeds.

3d. Pepin was owner of the covenant of warranty contained in his deed from Poncin, and French was owner of that contained in his deed from Pepin.

This proposition is of first consequence in determining the question of title here involved, and rests upon the rules of law governing the assignment of covenants.

The covenants referred to must have remained in the respective covenanters, unless they passed with the deeds subsequently made by them, which described, and purported to convey, the lands. Pepin must have retained Poncin's covenant, unless his own subsequent deed to French transferred it to French; and French must have retained Pepin's covenant, unless his own subsequent deed to Elfelt transferred it to Elfelt.

But such transfers did not take place. Neither of the deeds purported to assign any covenant contained in any prior deed, but only to pass the land itself.

If, therefore, the covenants of such prior deeds passed, it was only because they had become annexed to some interest in the lands which actually passed by the deeds, and carried the covenants with it as mere incidents.

But neither of such covenants ever became annexed to the land; or, to use the expression commonly applied, never ran with it.

That covenants relating to lands may become annexed to, so as to run with them; that is, so as to pass under bare mention in the deed of the land itself, they must be made by or with the owner of the land; or, at least, by or with the owner of some estate therein. Covenants, all parties to which are strangers to the land, never become annexed to it, and never run with it.

The leading case upon this point is an anonymous case, from Year-book 43 E. III., 3, cited in *Spencer's Case*, 5 *Coke*, 16, 1 *Smith's Leading Cases*, 22, which was this:

The prior of a convent covenanted for himself and his successors with the owner of a chapel, parcel of a manor, that he and his convent would sing in it for the lord of the manor, etc. The manor was afterwards conveyed by the covenantee to B., who gave it to C. in tail. Upon breach of the covenant occurring, action was brought by C, who claimed to be the owner of the covenant by virtue of ownership of the manor; and the court held the action well brought, because the covenant having been made with the owner of the manor, became annexed to it and passed by the transfer of the manor. But it was agreed that if the covenant had been to sing, in the chapel of a stranger, it could not have run with such chapel, because the covenantee not being the owner of the chapel, it could not have become annexed to it; and as authority for the proposition a case from Year-Book 2. H. IV., 6,*b*, was relied on, in which it was said the point had been adjudged.

The existenee of the same rule was affirmed in *Noke vs. Awder*, *Croke Elizabeth*, 373, which was where A., holding a lease for years, made an assignment of the term, with a a covenant for quiet enjoyment, to B., who made an assignment to C. Upon C. being ousted before the end of the term, he brought action upon the covenant against A. The original lessor had nothing in the land, and therefore his lease transferred nothing to the lessee. A. set this fact up as a defence, arguing that when he made his covenant there was no estate in him to which it could attach; that when B. made the as-ignment to C, no estate passed, because there was none in him to pass; that as a consequence the covenant sued upon had not passed to C., but remained in B. And the defendant prevailed.

Noke vs. Awder has usually been cited as the leading case upon the point that only covenants made with the owner of the land run with it; but erroneously, for the cases

from the Year-Books had established the doctrine two centuries before.

The rule of law thus settled by these old cases has been many times since affirmed by the later decisions both in England and in America. In fact, it correctness has hardly ever been questioned; so that it may be with the greatest accuracy said, that no space is left at this day for argument upon the point.

The modern reports contain many cases where deeds of lands in which the grantor uad no estate, having been executed with covenants, some remote grantee upon eviction by lawful owner, has brought action upon such covenants, claiming to have become invested with them by intermediate deeds describing the lands; but such actions have uniformly tailed.

Smith's Leading Cases, 6th Am. Ed. Vol. 1, *Part* 1, 141-2, 180-7, *Notes to Spencer's cases.*

Rawle on Covenants for title, 4th Ed., 362-372.

Andrews vs. Pearce, 4 *Bos. & Pul.*, 162.

Slater vs. Rawson, 1 *Met.*, 450.

Beddoe vs. Wadsworth, 21 *Wend.*, 120.

In the last edition of his work on Covenants for Title, pp, 373 4, Mr. Rawle, without expressing any positive opinion, intimates that, to his mind, the case of *Noke vs. Awder*, has been to a large extent explained away by the very recent case, *Cuthbertson vs. Irvine*, 4 *Hurtstone & Norman*, 742; 6 do.; 135; An examiuation of this latter case, however, shows that so far from explaining away *Noke vs. Awder* as an authority for the doctrine that only covenants become annexed to and run with the land which are made by or with its owner, the case does not even draw that doctrine into question; but, upon the other hand, proceeds directly upon its truth. *Cuthbertson vs. Irving*, turned solely upon the question of estopel; a doctrine which it would have been useless to invoke, had it not been for the existence of the rule here contended for. It was a case where A., having no legal estate in a tenement, entered into a lease of it

for years with B, who covenanted on his part to repair. B took possession under the lease, and A made a transfer of the estate to C. Upon breach of B's covenant to repair, he being yet in possession under the lease, C brought action against him, claiming ownership of the covenant by virtue of the transfer of the land from A. B, however, set up A's want of title as a defence, on the ground that for that reason the conveyance to C had carried no estate with it, and so had not transferred the covenant. It was held, however, that B, being a tenant still in possession under the lease, was estopped from saying that his landlord had no title to pass by the lease, and therefore that a defence resting solely upon denial of the landlord's title, was not open to him. In so far as *Noke vs. Awder* was relied upon to show that such a defence could be set up by a lessee in possession against his lessor and those claiming under him, that claim was overruled, on the familiar ground that a tenant in possessson is estopped from disputing his landlord's title for any purpose whatever. But the case went no further than this. It proceeded on the narrow ground that the tenant was precluded by acceptance of such relation from setting up the truth in reference to his landlord's title; and certainly it would have been wholly irrevelant to argue and decide whether or not the truth might be set up, if it should consitute no defence, when properly spread out upon the record.

Cuthbertson vs. Irving is confined as an authority strictly to cases arising between landlord and tenant. It has no application whatever to cases arising between vendor and vendee.

See comments on this case by the English annotaters of *Smith's Leading Cases*, 6*th Am. Ed.*, *Vol.* 1, *Part* 1, 153-5 (6); also by American Annotaters, do., 187.

But if *Noke vs. Awder* should be explained away as any authority upon any point, the principle for which it has been so long relied on as a leading case would remain unaffected; since the real foundation of the doctrine is the older cases referred to.

The principle established by these authorities does not rest, to any essential extent, upon the common law rule, that choses in action are not assignable. For none of the cases in which the question has arisen were where assignments of the covenants themselves had been attempted; but where nothing more than the transfer of the lands to which they related had been essayed. The necessary question was not whether the covenants sought to be enforced could have been transferred, if such transfer had in terms been attempted; but always whether assurances purporting merely to pass the lands had carried with them the covenants as incidents to the lands. Briefly put, the principle is merely that covenants cannot run with the land from vendor to vendee, when there is no land in the vendor with which they can run.

The cases *Slater vs. Rawson* and *Beddoe vs. Wadsworth*, have introduced into this country a rule not recognized by the English courts; but which relates merely to the application of the doctrine, and not to the doctrine itself.

It is this: that when the covenanter has *actual possession* of, though no valid title to, the lands to which the covenant relates, and acting under the deed containing such covenant, transfers actual possession to the covenantee, then the covenant will pass to a subsequent transferee of the land by the covenantee. This rule is expressly put upon the logical as well as equitable ground, that possession is of itself a sort of estate in the possessor, which, although it may be presently subject to be determined by entry by the lawful owner, yet by the running of the statute of limitations will ripen into actunl ownership, good as against all the world. The difference between this and the more severe English rule, which does not recognize possession without right as an interest to which covenants are capable of attaching, is not as to whether covenants relating to lands can become annexed to, so as to run with them, where the parties have no estate, but as to what constitutes the necessary estate.

Since the American rule rests wholly upon the ground

that a possession effectual to pass covenants will, if it continue, at last ripen into a valid estate, it follows that where such would not be the case, the rule cannot apply. The public lands of the Union would, almost without exeeption, be outside the rule for the reason that government can have no adverse possessor of its domain. The unlawful occupant of United States lands can never become through mere lapse of time, better than a bare trespasser. He can never, through that means alone, arrive at a point nearer to an actual estate, than at his first invasion of the soil.

When, however, possession is by authority of law, and coupled with inchoate title, there may possibly be, even in case of United States lands, such an interest as would be capable of supporting and passing covenants relating to it. But after careful search through the reported decisions of both United States and State Courts, counsel have been able to find but one case where the doctrines of *Beddoe vs. Wodsworth* and *Slater vs. Rawson* has been deemed applicable to government lands—*Fields vs. Squires*, 1 *Deady*, 366. In that case, however, there was no pretence that the occupation, which was under claim of title and was older than the title of the United States, was unlawful.

The case at bar would not be a proper one for the application of that doctrine, because any occupation of the lands in question, prior to their entry under the Act of 1854, would have been in direct and inexcusable violation of law.

But possession by any one from whom either of the parties derives title, is not claimed to have existed prior to the entry of Poncin in 1854. It is, therefore, hardly necessary to discuss at length what would have been the effect had there been such possession.

4th. Neither Poncin, Pepin nor French was under any manner of obligation to the Eletelts, nor to any one claiming under them, in regard to the lands.

It has been shown that none of the covenants in the deeds of Poncin and Pepin passed to the Elfelts, and there was no other way in which they could have become obli-

gated to the latter or to their grantees. French's deed was a mere release, operating only upon his then present interest, which was zero. It contained no averment of title, and no covenant, whereby French became bound as to the future. The contract, it is true, was that in case Poncin should acquire a good patent title from government, then French should make a conveyance with warranty. (Record p. 18.) Strict performance of the terms of the contract might have been insisted upon by the Elfelts had they so chosen; but they elected to take a quit-claim deed without covenants as a fulfilment of French's obligation, (Record, pp. 7, 18); and the rights and duties of the parties must be determined by the conveyance that was actually accepted.

French was not, by the terms of the article, bound to make any kind of deed unless or before Poncin should acquire a good patent title; his making therefore, at a time when he was under no duty to do so, a deed even of release, but one having legal effect to pass all his present estate, was a sufficient consideration, if any were necessary, for the acceptance of such deed by the Elfelts, in place of one with covenants, which, as events turned out, they might have had by waiting three years. The quit claim deed having been made and accepted as performance of the contract, the latter instrument thereupon became *functus officio*, and its provisions of no consequence to the parties afterward.

The situation, then, of the parties, at the time of the entry of the lands in 1857, being as stated with reference thereto, and to each other, it next becomes necessary to ascertain what became of the title to the 100 acres after its passage from government.

Did it go to Poncein and remain in him? or did it pass through him, and immediately, by operation of law, vest in another, and, if so, in whom?

That it did not remain in Poncin, if it ever went to him, both parties agree.

The only points of difference, therefore, which can exist

between the appellant and the respondents in this regard are:

1st. Did the title to the 100 acres ever go to Poncin at all? and

2d. If it did go to him, in whom did the law, by its own operation, immediately vest it?

The first point, if indeed such difference exist, must be resolved in the affirmative. When government took the price fixed by it for the lands, from Poncin, and gave him its certificate of entry, and afterwards its patent of conveyance, it parted with all its own interest, which consisted of the entire estate in the lands, to him.

This must have been the effect unless the act operated as a grant to some third person in and of itself. But the act shows plainly on its face that it was not designed to operate in that manner. It expressly provides that a conveyance be executed by government to a designated person. The assurance directed by the act to be made for the lands, was that which had before, and since has, been uniformly employed by the United States to pass a full and absolute estate of fee simple, in the premises conveyed by it, and for no other purpose.

"The whole legislation of the federal government in reference to the public lands, declares the Patent to be the superior and conclusive evidence of legal title; until it issues the fee is in the government, by the Patent it passes to the grantee, and he is entitled to recover in ejectment."

Bagnell vs. Broberick, 13 *Pet.* 436 (450).

Wilson vs. Jackson, *do* 397.

This act bears no trace of design on the part of Congress to use the Patent in this particular instance for production of other than the uniform effects of that kind of conveyance, to wit, the investment of the patentee with complete ownership of the real property by the patent described.

Had it not been the intent of this law that title to the whole tract should go to Poncin, the law would not have

provided for clothing him with the "superior and conclusive evidence" of such title.

If the act had been meant to be a grant in itself of parts of the tract to third persons, and that title should be passed to Poncin for the residue, merely, it certainly would not have directed that conveyance be made to Poncin of the whole. Whatever, therefore, became of the title subsequently, the conclusion cannot be escaped, that when it left the United States, it travelled as a unit, directly to Poncin, and that no part of it went to any other person in the first instance.

As to the second of the mentioned points of difference between the parties to this suit, its solution will be plain; provided that the special act of Congress contains nothing to prevent the operation upon the estate which Poncin took of general legal principles; and provided further that no estoppel can be set up to bar French and those claiming under his deed to Furber, from relying upon the truth.

The ordinary legal effect of the covenants of warranty which Pepin and French respectively held—the former by his deed from Poncin, and the latter by his deed from Pepin—at the time of acquirement of title by Poncin, cannot be open to dispute. The nature of the obligations of each covenanter to each covenantee, was that, in accordance with the tenor of the covenant, the former should maintain the latter in quiet enjoyment of the premises to which the covenant related free from molestation by any claiming under title paramount; that if the covenanter should be unable to perform his covenant specifically, then he should compensate the covenantee in damages; and that if the covenanter should at any time afterward, acquire any title to the premises not in him at the date of the covenant, that such title should at once, by legal operation, inure to the covenantee, and become vested in him.

Irvine vs. Irvine, 9 *Wallace*, 617. *Rawle on Covenants for Title*, 4*th Ed.* 390–2, *and cases cited. Bank of Utica vs. Merseson*, 3 *Barb. Ch.* 528. *Notes to Duchess of Kingston's Case*, 2 *Smith's Leading Cases.*

By virtue of the operation of the latter branch of the covenantor's obligation in order to satisfy Poncin's covenant to Pepin, Poncin's estate in the 100 acres at once enured to, and vested in, Pepin; and, in order to satisfy Pepin's covenant to French, Pepin's estate, so received from Poncin, at once inured to, and vested in, French.

But, when the title had thus arrived in French, it remained in him, from want of any relations to the Elfelts, upon which the law could operate to carry it to them. As has been before remarked, French was under no obligation as to the Elfelts' title in the land. He had not covenanted to protect their title, and he had not professed, in his deed to them, either to have or to transfer any interest whatever in the lands. The bargain, therefore, between them, was confined, in law as well as in fact, to the estate, if any, which French had at the date of his quit claim deed to the Elfelts. As to all future estates or interests, he and they were strangers.

No rule of law is better settled than that subsequently acquired interests are wholly unaffected by deeds of mere release without covenants, or without recitals of estate in the grantor.

Van Rensselar vs. Kearney, 11 How. 297 [322]. *Rawle on Covenants for Title, 4th Ed.* 390, 391, *and cases cited.*

Since, then, the operation of ordinary legal principles failed to carry the title to the 100 acres any further than to French, it must have remained in him until he granted it away, by sufficient deed of conveyance, which he did to Furber, afterwards, in 1856.

We are now brought to consider whether the ordinary rules of law did, in fact, govern in this case; or to what extent, if to any, the passage of title from Poncin to the party or parties in whom it ultimately vested, was controlled and guided by force of the act of Congress itself.

Appellant's position upon this point is, that the statute gave no direction whatever to the passage of the title, after its arrival in Poncin.

The only part of the act upon which argument can be based to show that Congress did not mean that the existing laws of the land, which were adequate to effect complete justice, should be left to operate upon Poncin's estate, and so to work out an adjustment of the rights of the respective parties, is that providing that "the entry of Peter Poncin," be allowed and *reinstated as of the date of said entry*.

Even this clause of the statute cannot be made the basis of such an argument, unless it must be accorded a literal operation. Ordinary legal principles were left by this clause free to accomplish their usual results, unless Congress not only meant the proposed transfer to relate back to the time of the location in 1850; but by the clause actually did make it relate back to that time and be of the same effect in law, for every purpose, and as between all persons, as if the location had been legally perfected

at that date; in other words unless by the clause all parties interested and the courts were estopped from saying that title did not in fact pass to Poncin in 1850.

The act did not purport to burden Poncin's title with equities or trusts in favor of any specified person. The statement that allowance of the entry is made so that the title may inure to the benefit of Poncin's grantees, does not declare a use in favor of any particular claimant of the land, in preference to any other; but does no more than to assign a reason operating upon the minds of Congress to induce the enactment of the law. It is simply a statement of one of the causes leading to so extraordinary and exceptional a piece of legislation. This recital, if it may be so termed, instead of negativing the idea that the question of title was to be left for settlement by general principles, is the strongest possible expression of intent on the part of the law-making power that it should be settled in that way, and in no other.

If therefore, the clause referred to cannot preclude us from insisting as a matter of law, as well as a matter of fact, that Poncin had nothing in the lands until October, 1854, no imaginable room is left to contend that the special act gave any peculiar direction of its own to the transit of title from Poncin forward. As regards this clause, the appellant denies that it had a literal effect. In so far as it assumed to produce retroactive results, it was inoperative; at least as to interested parties, other than the United States and Poncin.

If it had a literal and retroactive operation, its effect was to clothe the patent issued under it in 1854, with the same legal consequences that would have attended one lawfully issued in 1850.

Such a result was not accomplished for several decisive reasons. It could be accomplished only in one of two ways:—

1st. By the statute acting by way of ratifying a void act done in the name of the United States by one having no authority at the time; or

2nd. By the statute acting by way of saying that the rights of *all* persons should be under this patent precisely what they would have been if the attempted location had been effectual, and a patent had issued upon it.

It is unnecessary to argue that Congress is powerless to enact, with effect, that title to any property at the time actually vested in the United States was transferred by the latter years before; for to argue that it could, would be to propound a manifest absurdity. It is no less unnecessary to argue that Congress is powerless to enact with effect, to-day, that a designated person may have a patent of

some parcel of land in which none but government has any spark of interest, and that upon the issuance of such patent to-morrow the land shall have been the property of the patentee for the four years past.

However extensive the authority of that body may be, over the public domain, it caanot, from the very nature of things, declare wlth effect binding upon third parties, that lands have been transferred by government, one moment before they have actually passed from it.

It is manifest, therefore that the statute produced no retroactive results by virtue of its operating upon facts themselves, and changing them from what they really were.

It did not operate by way of ratifying any previous void act on the party Poncin and of the land officers.

Ratification can only take place, when the party ratifying consents to what has been done; and agrees to abide by it as it exists.

In this instance Poncin had never made any "*entry*" of the lands, and had never offered to make any.

The term "*entry*," as used in the land laws of the United States, and in the proceedings of its land officials, has always borne an exact and definite signification. Ii has always been employed in such connection, to signify the acquirement of lands by purchase. To designate their acquisition by land warrants, or by other instruments of like nature, the term "*location*," has always been applied. No instance can be pointed out, in all the complicated legislation of the United States upon the subject of its lands, where the use of the two terms has been interchanged. In no law of the Union, has the term "*location*" been used to designate purchase and payment for lands; and in none has the term "*entry*" been employed to designate their acquirement with land warrants, or with land script.

It is evident that the term "*entry*" was used by Congress in this law, in the strict sense which it has always borne; for the act is careful to provide that the "purchase money" be fully paid before any rights shall accrue. The law contemplated an "*entry*" only. It did not have any "*location*" or proffered "*location*" within its purview. It therefore, treated of something which had never existed. It provided for the allowance and reinstatement of that which not only had never been made but had never been contemplated.

The act did not propose to allow or to reinstate the only thing which had actually been done. It was not designed

nor permitted that the location of the land warrant should now be made, which the law had before rejected. If Poncine had, after the passage of this special statute, repossessed himself of his old land warrant, and offered to locate it upon these lands, he could not have done it. The officials were not authorized by the act to allow it. The only thing which the act did authorize, was an entirely new and original transaction, wholly unconnected with anything that had been essayed in the past. The old transaction was one where the owner of a certain quantity of unidentified public lands had attempted to select his property, and to divide it from the general mass. The new one, sanctioned by the special law, was a proposal to sell to the same person, for cash, the lands to which he formerly laid claim, as having previously been paid for with military services.

The dissent, therefore, by the United States to all that had been done by Poncin and its officers, in relation to these lands, was continued by the act, in full and unmodified force. Government consented to nothing, adopted nothing that had been done before in the premises. How then, can it be said that this act ratified anything that had before ever passed between Poncin and the United States, when every element of ratification was wanting in it?

The act did not operate by way of making the rights of the parties, other than Poncin, what they would have been at the date of the passage of the law, if the attempted acquirement of the lands by Poncin in 1850 had been consummated at that date.

Had the location of the land warrant been a lawful act, title to the lands would thereupon have vested in Poncin, and his deed would have passed it to Pepin; Pepin's deed would have passed it to French; and French's deed, though one of mere quitclaim, would have passed it to the Elfelts. The latter, or their grantees, would thus have been owners of the lands, and while neither Pepin nor French would have had anything in them, the respective covenants from Poncin and Pepin would have been completely satisfied, and effectually stripped of all further obligatory force. At the date of the enactment of the statute in ques-

tion, however, although none of the parties had anything in the lands, the covenants referred to, were living obligations, binding in full force not only upon the covenantors, but upon any title to the lands which should ever afterwards come to their hands.

If, therefore, this act put the parties in the same position that they would have occupied at its passage, had Poncin acquired title in 1850, it must have operated to extinguish these covenants; for it could not transfer the lands to Poncin, with his covenant still alive and binding the title to them in his hands, and make such title travel along the line of deeds that had been executed any further than to French. With Pepin's covenant from Poncin, subsisting at the moment when title should arrive in Poncin, the lands would become the property of French, and he could not be deprived of them without due process of law, in the sense of that expression as used in the Constitution.

But Congress was barred, by that Constitutional rule which prohibits the passage of laws impairing the obligation of contracts, from enacting any valid law that would modify, suspend or destroy any part of the obligation of these covenants without the consent of the covenantees. That quality of the covenants which had the legal effect to bind the title to the lands in the hands of Poncin and of Pepin, was a part of their obligation, and protected by the constitutional provision referred to, as effectually as that quality of them which bound the covenantors named to respond in damages for any breach of the covenants that might occur.

An Act could as well have been passed by the National Legislature providing that Poncin and Pepin should be relieved from responding in damages, for breach of these, their covenants, as one providing that the lands themselves whenever owned by Poncin or Pepin, should not be bound.

It does not require that contracts be utterly overthrown, to infringe upon the great constitutional safeguard mentioned; but it is enough that their obligation simply be impaired. If a law of Congress would operate to subtract anything whatever from the rights or advantages attend-

ing a subsisting contract, that law would be invalid and worthless. But if that part of the contract which bound the lands in this case were by the special act cut off, the most valuable part of the obligation was taken away.

But even if the obligation of the covenants was left unimpaired in all its features by this Act, Congress was prohibited by the Constitution from granting the lands to Poncin, and then saying that the rights of the other parties should be what they would have been had the location in 1850 been effectual.

For, with the covenants in full force, the title when vested in Poncin, would instantly pass through Pepin to French; and to take it from the latter by statute, would be to deprive him of his property in a way not permitted by the rules of constitutional law.

It will be no answer to these positions to argue that the lands were Government's, and that therefore it was free to grant them to whomever it should choose.

So far from denying or avoiding such fact and right, the Appellant not only admits them, but relies largely upon them to establish his case.

It is true, that none of the parties who had given or taken deeds of the lands, had any claim or right whatever to them as against government. It was free to grant them with or without price, to Poncin, Pepin, French, the Elfelts, or to any one else who should choose to accept the grant when made. Bnt the defect in such an agreement would be, that government exercised its right of disposition, by passing over all the title it had in the lands to Poncin; and by evidencing such transfer by a conveyance of the highest degree of solemnity of any in its use. It chose Poncin as the recipient of its grant, and appointed no particular person to share the advantages of the grant with him. Although government by its statute declared that it exercised its proprietary right of disposition of the lands, so that the title vested by it in Poncin might inure to the benefit of his grantees, in so far as he might have conveyed the same, it omitted to state which of the several parties claiming to stand in that relation was the one in-

tended. It did not even undertake to say that any part of the land had been conveyed, much less to decide whether French with his covenants, or the Elfelts without any, and holding a mere release applying to no future interests, was the person to whom the title, with which it was parting, should ultimately move. Congress plainly meant that whoever should get title after Poncin, should get it by the laws of the land, and did not mean to assume the task of itself settling and adjusting the conflicting claims of those deriving title from him. Had there been any design on the part of Congress to intervene between the adverse claimants, it would have adopted some mode of choosing between them, and when its choice had been arrived at, would have enacted that the title be made over to such person directly.

The insurmountable difficulty with Respondents' title is that that it would force a construction upon this act that would give to a mere quit-claim deed, having no covenants nor averments of title, equal efficacy with a deed having covenants, to pass subsequently acquired estates.

To add to such a deed by special statute, the quality which it did not possess when made, of passing after acquired interests, would not only be in conflict with the plainest constitutional provisions, protecting vested rights of property, but would be in the last degree unjust and oppressive.

And the Respondents are forced to claim title, if at all, under and through the passage by the quit-claim deed to the Elfelts, of the estate which French took from Pepin, years after the making of the deed. Not being named in the statute, and all the title to the lands having gone in the first instance to Poncin, the Respondents' can claim nothing, unless title passed from Poncin to Pepin; from Pepin to French, and lastly from French to the Elfelts. The quit-claim deed is the only link which holds them in any manner to Poncin. Cut out that link, and all connection between the Respondents and Poncin is severed.

No estoppel has arisen to bar or conclude French, or any claiming under him through the Furber deed, from averring the truth.

The essence of estoppel is, that the person estopped has done some act, or made some assertion, which good conscience or fair dealing would prevent him from afterward denying.

If the appellant is estopped from asserting anything, it is either that Poncin had not title in 1850, or that he had not title in 1851, when he quitclaimed to the Elfelts.

And if such estoppel arose at all it, was upon his deed to the Elfelts, because that is the only transaction between them of any consequence in determing that question.

That deed, however, contained no averment of title, and no covenant, and consequantly no statement capable either of being denied or affirmed. (Record, p, 19.) It is well settled in this Court, that a deed of that character works no estoppel whatever, upon the grantor.

Van Rensselar vs. Kearney, 11 *How.*, 297 (322). And such is the universal doctrine.

The only other act which French ever did in relation to the land, before the Elfelts took their deed, was his acceptance of the deed from Pepin. But that did not conclude him from denying, even as between himself and Pepin, that Pepin had nothing at the date of the deed in the lands, although that instrument contained full covenants. Two or three early cases in New York held that as between grantor and grantee, the acceptance of a deed estopped the latter from denying that the grantor had any title in him at the time to pass by the deed; but a later case in the Court of Appeals of that State, has overruled those cases, and in a jndgment of great learning and research, entirely exploded the doctrines which they propound.

Sparrow vs. Kingnan, 1 *N. Y.*, 242.

But, in addition to there being nothing in law to estop the appellant, there is not even anything in his asserting title inconsistent with the highest degree of good conscience and fair dealing, as a mere moral question.

Those who have dealt in the title here set up by the respondents have done so with all the facts upon which the

appellant relies to sustain his title, spread out upon the Statute Books of the United States, and upon the Records of the county where the lands are situated. They have acted with their eyes open, and upon a full knowledge of the facts. The law was before them, and if they mistook it, it was their own fault, and not that of any other person. Besides, they were constantly reminded of the adverse title here set up by the appellant, by the repeated conveyance of that title, of which quite as many transfers have been made, as of the other.

IV.

THE JUDGMENT IN THE ACTION TO QUIET TITLE BETWEEN ROBERTSON & VAN ETTEN AS PLAINTIFFS, AND DUNN AND FURBER AS DEFENDANTS, DOES NOT AFEECT THE APPELLANT'S TITLE TO THE LANDS.

Two years before the commencement of that action, Furber had conveyed all his interest in the lands to Hammond. Neither French nor Hammond were parties to that suit. That any parties to a suit are bound by a judgment in it, is a principle so familiar that to cite authorities in its support is useless. Hammond, therefore was not bound. His title remained wholly unaffectd by the decree. The fact that the deed was not on record made no difference in that regard. Plaintiffs in suits are not *bona fide* purchasers. That relation is only raised by deed of conveyance, carrying the actual legal title, for a valuable consideration. A judgment or decree can operate only upon such title as actually exists in the defendant. It can not transfer any title from him to the plaintiff, unless he has one to transfer.

In this case, neither Dunn nor Furber had any interest in them which they could impart to any person, by any process, and conseqnently none to go by the decree to Robinsan & Van Etten.

Holders of subsequently made deeds can not claim to have been *bona fide* purchasers on account of the decree, because if it were true, as the decree adjudges, that the deeds from French to Furber, and from Furber to Dunn, were void, then, if the Appellant could have title except for

the decree, the title must have still remained in French, who, not being a party to the suit, was wholly unaffected by it.

The statute of Minnesota in force when the deed to Hammond was made, did not apply to judgments; but by the laws of that then territory, no judgment against one in whose name lands appeared of record bound such lands, where they had actually been conveyed before the rendition of such judgment.

Banning vs. Edes, 6 *Minn.*, 402.

The amended statute, passed in 1858, was enacted to cover this supposed defect in the law. That statute, however, is in terms confined to *future* conveyances. It did not affect Hammond's deed, because that had been executed two years before.

Nor does this statute affect the Appellant's deed from Hammond. That deed was made in 1862, four years after the decree.

The manifest and self-evident operation of the statute is upon deeds made *prior* to judgments. Its purpose was to prevent the danger and inconvenience to those seeking to enforce claims against persons in whose names lands should appear of record, arising from collusive and secret unrecorded conveyances; and certainly a deed made years after a decree or judgment has been rendered, and has expended whatever force it has upon the lands, cannot work such, or any other mischief, to any person whomsoever.

For the reasons above stated, therefore, the appellant prays that the decree of the court below be in all things reversed, and that the appellant be decreed to be the owner in fee simple, of all the parcels of lands in his bill described, therein alleged to be claimed by the respondent.

W. P. CLOUGH,
Counsel for Appellant.

Court

United States Supreme Court.

WILLIAM M. McCARTY,
Appellant,
vs.
CHARLES A. MANN and
EBEN MAYALL,
Appellees.

ARGUMENT
FOR APPELLEES.

United States Supreme Court.

WILLIAM M. McCARTY,
Appellant,
vs.
CHARLES A. MANN and
EBEN MAYALL,
Appellees.

ARGUMENT FOR APPELLEES.

This is an appeal from a final decree of the Circuit Court of the United States for the District of Minnesota, adjudging the title to certain real estate to be vested in the appellees.

The appellant filed his bill in that Court against the appellees to quiet title. The real estate in question is situated in the city of Saint Paul, in the State of Minnesota, and is vacant and unoccupied. The object of the action, which is authorized by the Statutes of Minnesota, (Gen. Statutes of 1866, p. 538, and Laws of Minnesota for 1867, p. 117,) is to determine whether the appellant or appellees are vested with title to the premises in controversy. The Court below adjudged the title to be in the appellees.

The appellees answered the bill, and the case was heard upon an agreed statement of facts, which constitute a part of the record here, and upon which the whole merits of the case are to be determined.

These facts concisely stated are as follows, viz.:

STATEMENT OF FACTS.

On the 13th day of February, 1850, one Peter Poncin was permitted to locate the premises with a military land warrant, and received the usual certificate of entry on such location from the United States Land Office at Stillwater in Minnesota.

On the 28th day of March, 1850, the said Poncin conveyed by deed, duly recorded and containing full covenants of seizin and warranty, to one Alexander Pepin.

On the 29th day of March, 1850, the said Pepin conveyed by deed, duly recorded, and containing full covenants of seizin and warranty, to one Alpheus R. French.

On the 19th day of April, 1850, the said French executed to one Elfelt, a bond to convey the premises by warranty deed, which bond was recorded.

On the 19th of March, 1851, Elfelt having complied with the conditions of the bond, said French conveyed to Elfelt by deed of quit-claim, duly recorded.

On the 10th day of March, 1852, the Commissioner of the General Land Office cancelled the aforesaid Poncin entry, "for the reason that the lands located conflict with selections made under the act of March 3, 1849."

[The act last named, set apart the section where these premises are located, for schools in Minnesota.]

On the 13th of October, 1853, the said Elfelt conveyed by deed of quit-claim, duly recorded, to one Van Etten.

By an act of Congress, approved July 27th, 1854, entitled "An Act authorizing a patent to be issued to Peter Poncin for certain lands therein described," it was enacted as follows, viz.:

"Sec. 1. That the entry by Peter Poncin, of the north half "of the south-east quarter, and the south half of the north-"east quarter of section thirty-six, in township number "twenty-nine, of range twenty-three, in Stillwater Land "District, Minnesota, cancelled by the Commissioner of the

"General Land Office, be, and the same is hereby allowed and "reinstated as of the date of said entry, so that the title to "said lands may inure to the benefit of his grantees as far as "he may have conveyed the same: Provided, that the money "paid for said lands shall not have been withdrawn, or if "withdrawn, shall be again paid at said land office, and that "thereupon a patent shall issue in the name of said Peter "Poncin, for said lands.

"Sec. 2. And be it further enacted, that the Superintendent "of Public Schools in said Territory of Minnesota, be, and he "is hereby authorized to select other lands in lieu of said "section thirty-six, as far as the same have been granted or "sold."

On the 19th of October, 1854, said Elfelt executed to said Van Etten a further deed of quit-claim, duly recorded, for said premises.

On the 24th day of October, 1854, said Van Etten conveyed by quit-claim, duly recorded, to one Robertson, an undivided half interest in the premises.

On the 31st day of October, 1854, the said Peter Poncin paid into the said Stillwater Land Office, in money, the price of the land so by him located with said land warrant (having withdrawn his warrant soon after said cancellation;) and afterwards, on the 24th day of March, 1855, pursuant to said Special Act of Congress, and in accordance with the laws, rules and regulations in such case made and provided, the United States executed and delivered unto the said Peter Poncin a patent for the said lands, in the words following, viz.:

"Certificate, No. 2200 A. The United States of America "to all to whom these presents shall come, greeting: Where- "as, Peter Poncin, of Ramsey county, Territory of Minnesota, "has deposited in the General Land Office of the United "States, a certificate of the register of the Land Office at "Stillwater, whereby it appears that full payment has been

"made by the said Peter Poncin, according to the provisions "of the Act of Congress of the 24th of April, 1820, entitled "An Act making further provisions for the sale of the Public "Lands; and also of the Act of Congress approved 27th July, "1854, entitled an Act authorizing a patent to be issued to "Peter Poncin for certain lands therein described, for the north "half of the south-east quarter, and the south half of the "north-east quarter, of section thirty-six (36), in township "twenty-nine (29) north of range twenty-three (23) west, in "the district of lands subject to sale at Stillwater, Min-"nesota Territory, containing one hundred and sixty (160) "acres, according to the official plat of the survey of the said "lands returned to the General Land Office by the Surveyor "General, which said tract has been purchased by the said "Peter Poncin.

"Now, know ye, that the United States of America in con-"sideration of the premises, and in conformity with the sev-"eral Acts of Congress in such case made and provided, have "given and granted, and by these presents do give and grant "unto the said Peter Poncin, and to his heirs, the said tract "above described; to have and to hold the same, together "with all the rights, privileges, immunities and appurtenances "of whatsoever nature thereunto belonging, unto the said Peter "Poncin, and to his heirs and assigns forever.

"In testimony whereof, &c."

On the 2d day of July, 1855, the said Robertson and Van Etten laid out and platted the premises into an addition to the City of Saint Paul, as "Robertson & Van Etten's addition to Saint Paul."

On the 14th day of January, 1856, the said French executed a deed of quit-claim, in the usual form, and duly recorded, to one Furber.

On the 28th day of June, 1856, the said Furber executed a deed of quit-claim, in the usual form, and duly recorded, to one Dunn.

On the 31st day of July, 1856, the said Dunn executed a deed of quit-claim, in the usual form, to one Hammond; and on the 20th day of September, 1862, the said Hammond executed a deed of quit-claim, in the usual form, to the appellant, McCarty. The two last named deeds were both executed in the State of Indiana, and neither of them have ever been recorded.

On the 30th day of January, 1858, after the said Dunn had in fact executed his said deed to said Hammond, the said Robertson & Van Etten, being ignorant of said deed, which never has been recorded, and supposing that whatever title passed by the aforesaid deed from French to Furber, was then in Dunn, who had placed his deed upon record, and relying on the records in the Register of Deeds office, which disclosed said title to be still in said Dunn, commenced an action in the State Court of general original jurisdiction, against the said Furber and the said Dunn, and filed his complaint in said action in said Court on that day, and a summons thereupon duly issued in said action, and was duly served on the said defendants, John P. Dunn and P. P. Furber, on the former by the publication thereof in accordance with the statutes in such case made and provided; in which said complaint the plaintiff therein claimed to be in the possession of so much of the premises first herein above described, as is covered by said Robertson & Van Etten's addition to Saint Paul, and among other relief, demanded judgment, that the title to said premises so embraced in said addition be adjudged to belong to and to be quieted in the said plaintiff: that such proceedings were afterwards had in the said action, that a judgment was duly entered therein on the 25th day of August, 1858, in favor of the plaintiffs therein, the said Furber and the said Dunn. Whereby it was among other things adjudged and decreed by the said court that the said Isaac Van Etten and Daniel A. Robertson were the owners in fee simple of all and

singular the said premises so covered by the said Robertson and Van Etten's addition to Saint Paul, and entitled to and in possession thereof; that the said deed from said French to said Furber, bearing date June 14th, 1856, and purporting to convey said south-west quarter of the north-east quarter, and the west half of the south-east quarter of the north-east quarter of said section thirty-six was null and void, and of no effect so far as the same relates to and includes the said addition to Saint Paul; and that the said deed from the said Furber to the said Dunn, bearing date June 28th, 1858, purporting to convey the premises last above described, was also null and void and of no effect, so far as the same relates to and includes said addition; and that the said judgment be recorded in the said Register of Deeds' office; and that the title to so much of said premises as embraces said Robertson & Van Etten's addition to Saint Paul, rest in the said Robertson & Van Etten, the plaintiff in said action, without any further act or deed on their part, or the part of the defendants in said action: which said judgment was afterwards, on the 26th day of August, 1858, duly recorded in said Register of Deeds' office, in Book "A" of Miscellaneous, on page 60.

That afterwards, by sundry deeds of conveyance duly executed, acknowledged and delivered by the said Isaac Van Etten and Daniel A. Robertson, and by those claiming by, through and under them, and all duly recorded in the office of the said Register of Deeds, all the right, title and estate which the said Isaac Van Etten and Daniel A. Robertson, or either of them, acquired under and by virtue of the deeds and instruments in writing and the judgment and proceedings in the aforesaid action, and of the facts and matters aforesaid in and to the lots and blocks which are the subject of controversy in this action, has been duly acquired by and vested in these appellees, all of which said deeds and conveyances were executed for valuable considerations and in good faith without any

notice of the deeds from the said John P. Dunn to the said Abram Hammond, or either of them, in the complainant's bill set forth, and without any notice of the deed from the said Hammond and wife to the complainant, also in said bill of complaint set forth.

In addition to the foregoing statement, the following facts are admitted to be true, subject to objection by appellant as to relevancy and materality, viz.:

The whole tract claimed by appellant, amounting to one hundred acres, has been all platted and laid out into additions to the city of Saint Paul by parties claiming title under said deed from French to Elfelt, and has become of the value of at least two hundred and fifty thousand dollars; that a number of the lots so laid out and platted in said additions have been improved and are held by actual occupants residing thereon holding under the said Elfelt title; that no portion of said premises has ever been actually occupied by any one claiming under the appellant's said title from the said French; that no one claiming under appellant's title has ever paid any taxes on said premises, or demanded possession of anyone so occupying adversely, prior to the commencement of this action; that the appellant and those under whom he claims have been cognizant of the improvements so made upon said premises, and have made no objection thereto, and given no notice of said claim of title beyond what appears by the record of the deeds from French to Furber and from Furber to Dunn aforesaid.

APPELLEES' FIRST POINT.

The act of Congress of July 27th, 1854, and the patent issued in the name of Peter Poncin, under it, must have operated to vest title in one of two ways, either of which will support our title.

1. It operated to vest it by giving full and complete effect to the original entry of Feb. 13, 1850. the same in all respects as though said entry had never been cancelled, in which case the deeds themselves are the conduits through which the title passes; or,

2. It operated to vest it *directly* in the persons who, under the act, are contemplated under the term "the grantees of Peter Poncin." In the latter case the deeds are not conduits of title, but merely the means of designating the persons who take title *directly* by grant from the United States.

Considering these views in their order:

1. The title granted by the patent that issued under the act in question, related back and took effect as of the date of the original entry, precisely and for every purpose the same as it so relates back and takes effect upon a patent issued upon an ordinary entry.

It is well settled that while a patent is necessary in order to pass a perfect and consumate legal title to public lands, when once granted the title inures to any one to whom the patentee is bound to convey the land, or for whose use he ought to hold it.

Green vs. Liter, 8 Cranch, 229.

Lindsay vs. Lessees of Miller, 6 Pet., 677.

It is equally well settled that the patentee's quit-claim deed, given after entry and prior to the patent, estops him from claiming the after acquired title.

Herman on Estoppel, sec. 263.

The principle is, "that where one buys land and pays for it, and there is a deed made subsequently to the grantee in consequence of his purchase, it does not confer a new title on him,

but confirms the right which he had before the deed was made."

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Irvine vs. Irvine, 9 Wallace, 617.
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In our case the act provides that the repayment of the money, if withdrawn, shall have the same effect as if it was allowed to remain, so that payment, *so far as it affects the title*, must stand as made of the date of the original entry.

The only question then is, Did the Government of the United States make good the first entry of Peter Poncin? It seems to us that the question is answered in the affirmative by the very terms of the Act of Congress of July 27th, 1854, which provides,

"That the entry by Peter Poncin, cancelled by the Com-
"missioner of the General Land Office, be, and the same is
"hereby allowed and reinstated as of the date of said entry,
"so that the title in said lands may inure to the benefit of his
"grantees, so far as he may have conveyed the same."

Language could not express in plainer, clearer terms, a ratification of the original entry. And why is it reinstated? Not for the benefit of Peter Poncin, but as the act expressly tells us, "So that the title to said lands may inure to the benefit of his "grantees, as far as he may have conveyed the same."

Congress well knew that as a matter of fact Peter Poncin never had *conveyed* the same, for he never had any title whatever. His warranty deed to Pepin, and Pepin's warranty deed to French, conveyed nothing any more than French's deed to the Elfelts. Upon what principle then can it be held that Congress had reference to a grantee by one of these deeds more than another, when, in fact, neither of them conveyed anything? If he had in fact conveyed the same, the act was unnecessary, for title would have vested already. The question,

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What was the intention of Congress in designating as beneficiaries the grantees of Peter Poncin "as far as he may have conveyed the same," it seems to us can have but one answer, viz., to have the title relate back and take effect as of the date of the original entry.

There is no difficulty whatever in giving the title this effect. No rights of third parties had intervened, as the appellant in his argument assumes. What rights had Pepin, or French, or any one else, as against the United States? If in the mean time the United States had granted these lands to Pepin, or to French, or to any one else, then the title could not be allowed to relate back to the prejudice of these intervening rights. No rights whatever had intervened, and the government was the absolute owner of as well as sovereign over these lands. What then can prevent the government from giving the fullest effect to Poncin's original entry, if so disposed?

The matter stood thus: The land officers at Stillwater, acting as agents of the United States, had made an unauthorized sale of these lands to Peter Poncin. Unless ratified, the sale is void upon precisely the same principle that every unauthorized act of an agent is void. But the United States chooses, in the exercise of its rights as owner of these lands, to ratify and make good that sale: the legal effect of which ratification is to make good the act of the agent from the beginning, not only in regard to the agent himself, but as to Peter Poncin and all third parties. The principle is elementary, that in such case "the act is treated throughout as if it "had been originally authorized by the principal, for the rati- "fication relates back to the time of the inception of the trans- "action and has a complete retroactive efficacy."

Story on Agency, (ed. of 1869) p. 287, sec. 244.

We insist then, that no title could possibly vest in Poncin

under the act in question and under the patent that issued under it, except a title to take effect by relation as of the date of the original entry, and of course thereby every subsequent deed takes effect upon the same theory, among the rest ~~Our~~ deed Frundt to Egelh

2. But it is not necessary for our purpose to sustain the original entry of Peter Poncin's grant for the purpose of the argument that it never was made good. The title under the act does not take effect in virtue of the deeds. The grant is direct by Congress to certain parties. These parties are not designated by name, nor need they be so designated. It is sufficient that they can be ascertained. *Id est certum quod reddi certum potest.* The rule by which they are to be ascertained, is clearly laid down in the act, and it is this: *We give these lands to the parties who would be entitled to them in case the original entry of Peter Poncin had been valid.* If Peter Poncin has made no attempted conveyances, then to him; if he has made conveyances, (and it was clearly understood he had done so,) then to the parties to whom such conveyances run. The conveyances do not operate as conduits through which title passes, but simply as guide boards or finger posts pointing to the persons who are to take as grantees under the act.

If Peter Poncin has made deeds which would have operated a conveyance in case his original entry was valid, then no title in fact ever vested in him, and his deed cuts no figure as a link in title—it simply designates or is one of the *indicia* to indicate the person who is the beneficiary under the act. In this connection, notice the fact, that the act provides that a patent shall issue, not *to Peter Poncin*, but *in the name of Peter Poncin.* If none were to be benefitted but such as could secure an after acquired title upon the principle of estoppel, then a patent to Peter Poncin would suffice, and so much of the act as relates to the grantees of Peter Poncin, and which

is framed with evident care to protect them and their rights, is wholly surplusage, and has no effect whatever.

APPELLEES' SECOND POINT.

The whole theory of appellants' case rests upon the hypothesis that the act in question and the patent under it only operated to vest title in Peter Poncin, as of the date of his second entry, and that none are grantees under the act but those who can claim the subsequently acquired title by estoppel.

It seems to us that the theory is utterly without foundation.

But, conceding it sound, and still the appellees have a good title, for the subsequently acquired title of Peter Poncin inures to the benefit of the Elfelts, under whom we claim, by virtue of the covenants in the two deeds, Poncin to Pepin and Pepin to French, and of the quit-claim deed from French to the Elfelts.

The two former deeds both contain covenants that the grantor is well seized of an estate in fee simple, and has good right to convey, as well as the usual general covenant of warranty: the latter deed is a quit-claim, but purports to convey all the interest of the grantor, "as well in expectancy as in possession."

We insist:

1. For all the purposes of this action, and as to all the parties thereto, French was well seized and in possession of the premises at the time when he made his deed to the Elfelts.

This clearly follows by estoppel under the covenants in the deed from Pepin to French, and under which *all parties claim*.

Neither Pepin nor French, nor anyone who claims title under

that deed, can deny the seizin of Pepin, for it is affirmed in the covenants thereof. Of course the complainant cannot.

The general principle is thus stated in the books, viz.:

"If the seizin or possession of a particular estate is affirmed "in the deed, either in express terms or by necessary implica- "tion, the grantor *and all persons in privity with him*, are estop- "ped from ever afterwards denying that he was so seized and "possessed at the time he made the conveyance. The estoppel "works on the estate and binds an after acquired title as be- "tween parties and privies."

Herman on Estoppel, p. 281, sec. 260, and p. 291, sec. 272.

"The reason is, that the estate thus affirmed to be in the "party at the time of the conveyance must necessarily have "influenced the grantee in making the purchase, and hence the "grantor and those in privity with him, in good faith and fair "dealing, should be forever thereafter precluded from gainsay- "ing it."

Id. sec. 272.

The Elfelts, when they took their deed from French, had a right to rely upon the deed from Pepin to French, under which French was then claiming title, and upon the estate affirmed by that deed to have been in Pepin. Pepin is not only estopped to deny that he *was lawfully seized* and had good right to convey; but French and every party claiming the Pepin title under French is so estopped. Of course, so is the appellant estopped.

It follows then for every purpose of this action that French was lawfully seized under the Pepin deed. If Pepin was so seized, that seizin was transferred to French under the deed from Pepin to him.

Here must be applied the well-known principle, that under a deed, whether of bargain and sale, of quit-claim and release,

or of lease and release, if the ~~grantee~~ Grantor in the deed be *seized*, such deed will operate to transfer to the grantee all covenants that run with the land. Hence by virtue of the deed from French to the Elfelts, the covenants of warranty and all the covenants running with the land, both in the Poncin deed and in the Pepin deed, passed to the Elfelts. Hence the after acquired title of Poncin passed at once by operation of law through Pepin and French to the Elfelts and their grantees.

This in nowise conflicts with the general principle that a deed simply of release passes only such interest or estate as the releasor has at the time, and never operates by way of estoppel to convey any interest which the grantor may afterwards acquire.

If French had got his subsequently acquired title from *any other source than Pepin*, we should get no benefit from it, and the general principle above referred to would apply. But when that title comes to him from Pepin, under and by virtue of the very deed upon which we relied when we purchased, he is estopped from saying that title did not pass when that deed was first given. As between all of French's grantees and of course as between the parties to this action, that title passed *instanter* when the deed was executed by Pepin to French, and of course vested in the Elfelts as effectually as though their deed had contained full covenants.

That such covenants did pass to the Elfelts is well settled.

Beddoe's Ex'r. vs. Wadsworth, 21 Wend., 120.

Hunt vs. Amidon, 4 Hill, 345.

The latter case is directly in point as an authority to sustain us in this position, viz.:

The rights of the Elfelts, as assignees of French upon the covenants in the deed from Pepin, are the same as they would have been if the deed from French to the Elfelts had contained similar covenants of seizin and warranty. See page 347.

See also Fields vs. Squires, Deady's Reports, (U. S. Cir., Oregon, p. 366.)

The subsequently acquired title of Poncin inures to the benefit of the parties who are the beneficiaries of the covenants in the Pepin and Poncin deeds, and these beneficiaries are the Elfelts. As against the Elfelts, French can claim nothing, because his deed to them is a bar to any such claim; by it he is cut off from the only source by which such title could inure to him. His deed to the Elfelts cuts him off from the subsequently acquired title, so that it is impossible it should come to him, for by it he transferred the covenants, the sole medium by which the title could pass to any one. In other words, this is not a case where French gets an after acquired title at all, for this title *fails to reach him*, so there is no occasion to see whether the principle of estoppel can act on his deed of quit-claim. It will also be noticed that the deed from French to the Elfelts purports to convey all of his interest "as well in *possession* as expectancy."

Is not this a recital that he has an interest in possession which he is estopped to deny. We claim it is, and insist that French is estopped by his own deed to deny possession of the land, for he expressly affirms it.

There is another principle upon which the appellant is estopped to deny the Elfelt title, and that is, that both he and the appellees claim under the same grantor, French.

Suppose the appellant was in possession and the Elfelts bring ejectment. Could the appellant deny that French had title when he conveyed to the Elfelts? What is appellant's title? Simply this and nothing more, that Pepin by his deed of warranty, passed the title to his grantor French. But when did he pass the title? As he claims by estoppel only, his theory is that Pepin's deed passed a good title; and of course

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If French had got his subsequently acquired title from *any other source than Pepin*, we should get no benefit from it, and the general principle above referred to would apply. But when that title comes to him from Pepin, under and by virtue of the very deed upon which we relied when we purchased, he is estopped from saying that title did not pass when that deed was first given. As between all of French's grantees and of course as between the parties to this action, that title passed *instanter* when the deed was executed by Pepin to French, and of course vested in the Elfelts as effectually as though their deed had contained full covenants.

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his theory requires title to pass at once when the deed is executed. It was just as effectual then as ever. His theory then rests upon the assumption that French *always* had title, for he never had but one deed and that deed is his only source of title.

If appellant is forced to rest his title upon this theory, he must take it with all its consequences, and one of the necessary consequences is that French had a good title when he conveyed to the Elfelts, and of course that title passed by his deed to them.

We insist then, that so long as appellant derives his whole title from the Pepin deed, and derives it solely upon the theory that Pepin is estopped to deny that he had title when he made his deed, that he is equally estopped to deny that title did not pass to French, and consequently is estopped to deny that French had not a good title when he conveyed to the Elfelts.

See Richard Douglass vs. Thomas Scott, 5 Ham. Ohio, 190.
M. T. C. Royston, et al. vs. Jas. D. Wear, et al., Head's Tenn. Reports, p. 8, vol. 3.
Carver vs. Jackson, 4 Peters, 1.

APPELLEES' THIRD POINT.

The deed from French to the Elfelts, though in form a quit claim, was sufficient.

"A deed of release and quit claim may convey the interest "of the releasor without words of grant, although the releasee "had no prior interest in or possession of the estate."

2 Wash. Real Estate, citing—
Jackson vs. Fish, 10 John. 456.
Overruling Bennett vs. Irwin, 3 John. 365.
Russell vs. Coffin, 8 Pick, 143.
Pray vs. Pierce, 7 Mass. 381.

The Elfelt deed was a bargain and sale by the words *remise, release and quit claim*, and these words were sufficient to raise a trust or use for the benefit of the bargainees, the Elfelts, and by the statute of use was transferred into possession.

Jackson vs. Fish, supra.

The principle is, that where it is apparent that there was an intention in the grantor to convey, and in the grantee to take, although the instrument is not calculated technically to execute the intent, it should be made to operate in some other way to effect the purpose.

Russell vs. Coffin, supra.

The court will give effect to the intention of the parties in a way different from the technical operation of the instrument.

Thus, in Shep. Touchstone, p. 82.

"A deed that is intended and made to one purpose, may "inure to another; for if it will not take effect in the way in- "tended, it may take effect another way. And, therefore, a "deed made and intended for a release may amount to a grant "of a reversion, an attornment, or a surrender, or *e converso*. "And if a man have two ways to pass lands by the common "law, and he intend to pass them one way, and they will not "pass that way, in this case, *ut res valeat*, they may pass the "other way."

We have not elaborated our argument on this point, as it was not controverted by the appellant in the court below, and is not, as we understand, controverted here.

APPELLEES' FOURTH POINT.

The deed from Dunn to Hammond and from Hammond to appellant, unrecorded, cannot prevail against the Robertson & Van Etten decree quieting title against the parties who by

the records were holding the Furber title, the full benefit of which decree inures to appellees.

The recording act of Minn., (Compiled Statutes Minn. 1858, "p. 400, sec. 24,) provided, that every conveyance of real "estate which shall not be recorded as provided by law, shall "be void, as against any subsequent purchaser in good faith, "and for a valuable consideration of the same real estate, "whose conveyance shall be first recorded."

"By section 30, same act, p. 400, the term conveyance shall "be construed to embrace every instrument in writing, by "which any estate or interest in real estate is created, aliened, "mortgaged or assigned, *or by which the title to any real estate* "*may be affected in law or equity.*"

We insist,

1. That under this statute a decree quieting title to real estate, is clearly a conveyance. The good faith of the decree is not questioned, the case admitting that it was taken without notice of the deed from Dunn to Hammond.

The cost and expense of taking the decree, is a *bona fide* payment of money to obtain it; in legal intendment, then, and within the spirit of the statute, Robertson & Van Etten became purchasers in good faith, and for a valuable consideration, and by the record of their decree rendered the prior unrecorded deed of Hammond, null and void as against them, and the appellees who claim under them. We think this position tenable; if not, then

2 By subsequent statute, passed August 3d, 1858, and in force when the decree was taken, (Complied Statutes of Minn., 1858, p. 404, sec. 54,) "Every conveyance hereafter made "shall be recorded, &c., and every conveyance not so recorded "shall be void as against a subsequent purchaser in good faith, "and for a valuable consideration, whose conveyance shall be "first duly recorded, *or as against any judgment lawfully* "*obtained* at the suit of any party against the person in whose

"name the title to such land appears of record, prior to the "recording of such conveyance.

The appellant has no title except under an unrecorded deed from Hammond, executed in 1862, after the statute last named was enacted, and hence belongs to that class of conveyances, (viz., those made after the enactment of the statute,) which are declared void, as against judgments, &c., lawfully obtained. Whatever might be Hammond's position, were he asserting his own title, his deed being prior to the statute last named, and hence not within the class so declared void as against judgments, the appellant is within the statute, his deed being subsequent to the statute, and not recorded.

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Solicitor, and of
Counsel for Appellees.

the records were holding the Furber title, the full benefit of which decree inures to appellees.

The recording act of Minn., (Compiled Statutes Minn. 1858, "p. 400, sec. 24,) provided, that every conveyance of real "estate which shall not be recorded as provided by law, shall "be void, as against any subsequent purchaser in good faith, "and for a valuable consideration of the same real estate, "whose conveyance shall be first recorded."

"By section 30, same act, p. 400, the term conveyance shall "be construed to embrace every instrument in writing, by "which any estate or interest in real estate is created, aliened, "mortgaged or assigned, *or by which the title to any real estate* "*may be affected in law or equity.*"

We insist,

1. That under this statute a decree quieting title to real estate, is clearly a conveyance. The good faith of the decree is not questioned, the case admitting that it was taken without notice of the deed from Dunn to Hammond.

The cost and expense of taking the decree, is a *bona fide* payment of money to obtain it; in legal intendment, then, and within the spirit of the statute, Robertson & Van Etten became purchasers in good faith, and for a valuable consideration, and by the record of their decree rendered the prior unrecorded deed of Hammond, null and void as against them, and the appellees who claim under them. We think this position tenable; if not, then

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H J Horn

St. Paul, Dec. 8th, 1873.

Solicitor, and of
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